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No. 83-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DONALD A. ALESSI and JOHN P. BARTOLOMEI,

Petitioners,

—v.—

COMMITTEE ON PROFESSIONAL STANDARDS, THIRD JUDICIAL DEPARTMENT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

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Donald A. Alessi and John P. Bartolomei respectfully petition for a writ of certiorari to review the judgment in this case of the Court of Appeals of the State of New York.[1/]

QUESTIONS PRESENTED

1. May a state, consistent with the First Amendment and this Court's decisions on lawyer advertising, discipline attorneys for mailing to real estate brokers in their vicinity a truthful and nonmisleading announcement of their availability to handle real estate matters?

2. May a state, consistent with the Due Process Clause of the Fourteenth Amendment, discipline attorneys for violating a state statute which, as construed, bans all lawyer advertising except insofar as

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1/ Henry Pedicone, Jr. and Linda Zablotny, who were named as co-respondents in the original misconduct petition filed by the grievance committee, did not pursue an appeal to the New York Court of Appeals.

the statute "infringe[s] upon constitutionally protected speech," and which therefore provides no actual notice of what conduct is forbidden?

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The decision of the New York Court of Appeals upholding the professional disciplinary ruling against petitioners, two judges dissenting, is not yet reported. (1a-31a). The order of this Ccurt granting certiorari and remanding for reconsideration in light of In re R.M.J., 455 U.S. 191 (1982), is reported at ___U.S.___, 76 L.Ed. 2d 339 (1983) (32a-36a).

The decision of the New York Court of Appeals prior to remand was issued without opinion (37a) and is reported at 58 N.Y.2d 689 (1982). The opinion of the Appellate Division finding petitioners guilty of professional misconduct (38a-43a) is reported at 88 A.D.2d 1089(3rd Dept. 1982). The opinion of the Appellate Division denying petitioners' motion to dismiss (44a-45a) is not reported.

JURISDICTION

The judgment of the New York Court of Appeals on remand was entered on November 3, 1983. Jurisdiction is conferred on this Court by 28 U.S.C. §1257(3).

STATUTES INVOLVED

New York State Judiciary Law §479 provides:

> It shall be unlawful for any person or his agent, employee or any person acting on his behalf, to solicit or procure through solicitation either directly or indirectly legal business, or to solicit or procure through solicitation or retainer, written or oral, or any agreement authorizing an attorney to perform or render legal services, or to make it a business to solicit or procure such business, retainers or agreements.

Disciplinary Rule 2-103(A) of the Code of Professional Responsibility adopted by New York State provides:

> A lawyer shall not solicit employment as a private practitioner of himself or herself, a partner or an associate to a person who has not sought advice regarding employment of a lawyer in violation of any statute or court rule. Actions permitted by DR 2-104 and advertising in accordance with DR 2-101 shall not be deemed solicitation in violation of this provision.

DR 2-104 and DR 2-101 are set forth in full in the Appendix. (83a-90a).[2/]

2/ Because the constitutionality of Judiciary Law §479 is drawn into question by this petition, and since respondent's status as a "state agency" is not entirely clear, 28 U.S.C. §2403(b) may be applicable to these proceedings and the New York State Attorney General has accordingly been served.

STATEMENT OF THE CASE

Petitioners Donald Alessi and John Bartolomei have been licensed attorneys in New York State since 1970.[3] In 1979, both petitioners were partners in the Legal Clinic of Cawley and Schmidt. During August and September of that year, the Clinic mailed approximately 1,000 letters to local realtors in the Albany area advising them that Cawley and Schmidt was available to handle "all aspects (buy or sell) of residential real estate transfers." The letter was not written by either petitioner. However, Alessi and Bartolomei reviewed and approved the letter before it was mailed. (57a).[4]

In accordance with the guidelines for attorney advertising set forth in New York's

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3/ The Petition of Charges and Specifications filed by The Committee on Professional Standards (53a- 58 a) erroneously indicated that petitioner Bartolomei was admitted to practice in New York State in 1980, rather than 1970. The same mistake was then repeated by the Third Department in its opinion. (41a).

4/ The full text of the letter is reprinted in the Appendix at 59a .

Code of Professional Responsibility,[5] the letter described the Clinic's basic fee schedule. Its simple text was truthful, informative and not misleading in any fashion.

Yet solely on account of this single letter, petitioners were charged with professional misconduct for violating §479 of New York's Judiciary Law and parallel provisions contained in New York's canon of ethics. (53a- 58 a). Petitioners' motion to dismiss those charges as a violation of the First Amendment was denied by the Appellate Division (41a - 43a), which relied on a decision by the New York Court of Appeals rejecting a similar claim in Greene v. Grievance Committee, 54 N.Y.2d 118 (1981), cert. denied, 455 U.S. 1035 (1982).

After the denial of their motion to dismiss, petitioners submitted a formal answer to the charges against them in which they again asserted that the letter mailed by

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[5] See DR 2-101. (83a - 88a).

the Clinic to real estate brokers was protected by the First Amendment. (48a-49a). In addition, petitioners alleged that §479 was unconstitutionally vague as applied to their case and thus denied them due process. (49a-51a).

Rejecting petitioners' defense without even a fact-finding hearing, the Appellate Division ruled on the basis of the papers submitted that petitioners were guilty of professional misconduct. (38a-43a).[6/] Petitioners then filed a jurisdictional statement with the New York Court of Appeals, renewing their claims under the First Amendment and Due Process Clause. On November 18, 1982, petitioners' appeal was dismissed sua sponte by the Court of Appeals "upon the ground that no substantial constitutional question is directly involved." (37a).

6/ That finding represents a "professional stigma," even in the absence of any other sanction. Green v. Grievance Committee, 54 N.Y.2d at 123.

This summary action by the New York Court of Appeals was premised upon its prior decision in Greene, which upheld New York's ban on third-party mailings on the theory that such mailings pose a potential conflict of interest.[7] The majority in Greene hypothesized that a lawyer who receives a referral from a real estate broker might have divided allegiance between the client and the broker on whom the lawyer is depending for future referrals. 54 N.Y.2d at 129. Consequently, the Greene court feared, the lawyer might be disinclined to bargain on behalf of the client about, for example, the broker's commission. Id.

The dissent in Greene responded to those concerns by noting that the dangers identified

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7/ One year prior to Greene, the New York Court of Appeals had unanimously held that "[d]irect mail solicitation of clients by lawyers is constitutionally protected speech which may be regulated but not proscribed." Koffler v. Joint Bar Association, 51 N.Y.2d 140, 143, cert. denied, 450 U.S. 1026 (1981).

by the majority existed in any referral system, did not depend upon the fact that the referral was based on a letter rather than social contacts, and could be dealt with by less restrictive means. 54 N.Y.2d at 129-136. In short, the dissent dismissed the majority opinion in Greene as "no more than direful speculation which...reflects perhaps unconscious, but nevertheless impermissible obeisance to the tastes and traditions of the pre-Bates yesteryear." 54 N.Y.2d at 132.

Because this Court had recently rejected the notion that attorney advertising could be prohibited based on "direful speculation" without substantiation in the record, see In re R.M.J., 455 U.S. 191 (1982), petitioners sought a writ of certiorari. On April 18, 1982, this Court granted the petition for certiorari, vacated the judgment of the Court of Appeals and remanded for further consideration in light of R.M.J. (32a-36a).

On remand, the Court of Appeals reaffirmed its earlier decision by a 5-2 vote. (1a-31a). The majority characterized the prohibition against third-party mailings to brokers by attorneys as merely a time, place and manner regulation. (8a-11a). At the same time, the majority implicitly conceded that it was upholding a prophylactic measure without any specific evidence in the record of actual abuse. (12a).

In addition, the majority rejected petitioner's vagueness challenge to §479 of the Judiciary Law, the statute on which petitioners' censure was based. The majority repeated its comment in Greene that the provisions of §479 totally barring all attorney advertising "remain in effect except as they infringe upon constitutionally protected speech." (14a). Thus construed, it concluded that prior decisions from this Court gave petitioners adequate notice that "the constitutional invalidity of §479 did not necessarily

extend to solicitations involving personal contact and the potential for conflict of interest." (14a).

The majority opinion provoked two dissents. Chief Judge Cooke disputed the majority's description of §479 as a time, place and manner regulation, noting that "[t]he restriction is invoked solely by reason of the message's nature--attorney advertising." (23a). He also disputed the majority's effort to distinguish R.M.J., observing that under the standard set forth in R.M.J., "[t]he State has not established that the problem asserted actually exists or that it has attempted to control the problem through less restrictive means that have failed." (24a).

Judge Kaye's disagreement with the majority's interpretation of R.M.J. was set forth in a separate opinion. As she explained:

> There is no finding that respondents' method of advertising is in fact misleading or subject to abuse. On this point, the majority states only that the

> predicate for the prohibition of respondents' advertising was spelled out in Matter of Greene (54 NY2d 118). But there is no finding in Greene that this method of advertising is in fact misleading or subject to abuse. The decision in Greene to prohibit such advertising was based on the possibility that the lawyer's view of marketability of title may be colored, the improbability that the attorney will negotiate the lowest possible broker's commission, and the probability that the lawyer will not examine the broker's puffery with the independence he otherwise would (54 NY2d at 129). It is clear from R.M.J. that the prohibition of attorney advertising cannot be founded on such hypothesis.

(29a-30a) (emphasis in original).

Thus, despite this Court's remand for further consideration in light of R.M.J., petitioner's constitutional rights, and the rights of the public they seek to serve, continue to be improperly abridged. Plenary review by this Court is, therefore, both necessary and appropriate.

REASONS FOR GRANTING THE WRIT

This case raises an important question about the permissible scope of state regulation of attorney advertising.

Two years ago, this Court unanimously upheld the First Amendment right of an attorney to announce the opening of a new office by mailing professional business cards to "a selected list of addressees" despite a disciplinary rule which restricted such announcements to "lawyers, clients, former clients, personal friends, and relatives." In the Matter of R.M.J., 455 U.S. 191 (1982). This case involves a similar effort by attorneys to alert prospective clients of their availability to handle real estate matters through an informational mailing to selected real estate brokers. For that reason, this case was remanded last year to the New York Court of Appeals for further consideration in light of R.M.J.

New York's reaffirmed refusal to permit any third-party mailings regardless of content is inconsistent with R.M.J. and should be summarily reversed. There is no showing in this record that third-party mailings are inherently deceptive or have proven deceptive in practice. Moreover, there was no assertion by the Court below that the flyers actually mailed by petitioners were either deceptive or misleading. Under the circumstances, New York's decision to impose a prior restraint on all third-party mailings, without even considering the possibility of less restrictive alternatives, plainly contravenes the holding of R.M.J. Nor can New York's prohibition properly be viewed as a time, place and manner regulation.

At the very least, this case involves a crucial form of attorney advertising that this Court has not yet addressed. In Bates v. State Bar of Arizona, 433 U.S. 350 (1977), this Court struck down a general proscription against attorney advertising on the ground that "such

speech serves individual and societal interests in assuring informed and rational decision-making." 433 U.S. at 364. In Ohralik v. Ohio Bar Association, 436 U.S. 447, 449 (1978), this Court reaffirmed Bates with the caveat that Bates had not withdrawn a state's right to "discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent." If not directly controlled by the decision in R.M.J., this case concerns conduct falling between Bates and Ohralik.

The issue presented to this Court is not an academic exercise in legal analogy, however. Most people in this country who require a lawyer must seek the advice of others. The era of "small town society" when "reputational information" was common knowledge has long since passed. Bates v. State Bar of Arizona, 433 U.S. at 374-375 n.30. Not surprisingly, these "changed conditions" have been clearly perceived by the legal profession and reflected

in its Code of Professional Responsibility. Because "the reputations of lawyers are not sufficiently known to enable potential users of legal services to make intelligent choices,"[8] the Code now affirmatively encourages those needing a lawyer to gather the "[d]isinterested and informed advice of third parties -- relatives, friends, acquaintances, business associates, or other lawyers. . ."[9]

The decision in this case effectively cripples that salutary process. The most cost effective way for a lawyer to make his or her services known to a community is often to make the sort of targeted mailing which petitioners used here. In the end, it is the public that profits as much as the lawyer from the dissem-

of information. Virginia State Board

8/ New York State Code of Professional Responsibility, EC 2-7.

9/ Ibid.

of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). Moreover, prohibiting all third-party mailings will not eliminate the risks associated with a referral system; it will merely restrict the opportunities made available through referrals to a limited group of well-connected lawyers.

Other states that have reviewed the propriety of third-party mailings in the wake of Bates have differed with the conclusion reached by New York. This conflict among the states is especially inappropriate in a First Amendment context and demonstrates the need for "more specific guidance," which only this Court can finally provide. In the Matter of R.M.J., 455 U.S. at 204 n.16.

In addition, this case presents an important procedural issue of constitutional significance totally distinct from the substantive question of whether New York can prohibit all third-party mailings by lawyers. Petitioners were disciplined for violating a section

of New York's Judiciary Law which was written ten years before Bates and has not been amended since. On its face, it purports to ban all attorney advertising in clear violation of Bates. Until the New York Court of Appeals decision in Greene, which occurred after disciplinary charges were filed against petitioners here, there was no way of knowing that this facially invalid statute would be construed to forbid third-party mailings, particularly since that practice is nowhere mentioned in the law itself. Furthermore, the limiting construction imposed by the Court of Appeals -- namely, that §479 prohibits all conduct which may be constitutionally proscribed without specifying what that conduct involves -- is inherently vague. Petitioners were disciplined, in short, for violating a statute with absolutely no notice that it applied to their conduct. That result offends fundamental notions of constitutional due process.

I. THE DECISION BELOW CREATES A CONFLICT WITH THE DECISIONS IN OTHER STATES

The decision below is directly in conflict with decisions on the same subject issued by at least two other state courts of last resort. In Matter of State Bar Grievance Administrator v. Jacques, 407 Mich. 26 (1979), the Michigan Supreme Court upheld the right of a lawyer to solicit tort claims through a union agent. In Kentucky Bar Association v. Stuart, 568 S.W.2d 933(Ky. 1978), the Kentucky Supreme Court upheld the right of a lawyer to do precisely what petitioners have done here -- send a letter to a real estate broker soliciting business.

Both these decisions were acknowledged and rejected by the New York Court of Appeals in the Greene case, 54 N.Y.2d at 129 n.4, which formed the predicate for the decision below. In addition to Kentucky and Michigan, Minnesota has also refused to prohibit third-party mailings in the absence of an agency relationship

between the attorney and any third parties who receive his announcement. Matter of Discipline of Appert, 315 N.W.2d 205 (Minn.Sup.Ct. 1981). Only then, the Minnesota court reasoned, could the attorney fairly be held responsible for the personal solicitation of the potential client by an intermediary.

The conflict among the states on whether third-party mailings are entitled to constitutional protection is also reflected in conflicting ethical rulings from state bar associations. The Grievance Committee of the Board of Overseers of the Maine Bar has issued an opinion (61a-69a) that Maine's anti-solicitation rule permits an attorney to write to the relatives of an accident victim offering legal representation, providing that the solicitation letter is not sent personally to a victim who is still in the hospital. Similarly, Oregon has specifically upheld the propriety of third-party mailings and, indeed, has used letters by attorneys to real estate brokers as a para-

digmatic example of permissible conduct. (70a). Oregon Legal Ethics Opinion Number 431, Guideline 15. Likewise, an Advisory Committee on Professional Ethics appointed by the Supreme Court of New Jersey has announced that "simple letters by attorneys advertising the availability of their services" may be mailed to real estate brokers so long as the brokers "have no personal acquaintance with the attorney." (71a - 76a).

By contrast, the Illinois State Bar Association has declared in its advisory opinion on this subject that an attorney may not send solicitation letters "to a targeted group of non-attorneys," although such letters may be sent to other lawyers. Illinois State Bar Association, Committee on Professional Ethics, Opinion Number 749. (77a-82a).

The authority to discipline lawyers and set rules for practice is, of course, a matter of state prerogative. But the discretion of the state is subject to constitutional con-

straints. Only this Court can resolve the dispute which has arisen among the states in the wake of Bates on the constitutionality of third-party mailings by lawyers.

II. THE DECISION BELOW IS INCONSISTENT WITH R.M.J. AND THIS COURT'S OTHER DECISIONS ON ATTORNEY ADVERTISING.

In R.M.J., this Court held that a prophylactic rule against attorney advertising could only be upheld "where the particular advertising is inherently likely to deceive or where the record indicates that a particular form or method of advertising has in fact been deceptive." 455 U.S. at 202. Given a "silent record" in R.M.J., id., this Court refused to uphold a Missouri rule prohibiting attorneys from sending a general mailing announcing the opening of a new business office.

This case presents a similarly "silent record." Specifically, there has been no allegation that the letters sent by petitioners led to any unethical conduct or that similar

letters had created problems in the past. Nevertheless, New York's prophylactic rule against third-party mailings was upheld on the ground that such mailings might, hypothetically, pose a conflict of interest.[10] That reasoning is irreconcilable with the rule in R.M.J.

The rule in R.M.J. represents a particularized application of the four-part analysis developed by this Court for commercial speech cases in Central Hudson Gas & Electric Company v. Public Service Commission, 447 U.S. 557 (1980). The first two prongs of that test present no problem in this case. There has never been any claim that petitioners' letter to real estate brokers was in any way misleading, and the state's interest in maintaining the quality

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10/ In Greene, the Court of Appeals indicated that its prohibition applied to "all third-party mailings to brokers." 54 N.Y.2d at 126. On remand in this case, the Court of Appeals narrowed its rule against third-party mailings "to that limited number of third persons who themselves may have dealings with potential clients of the attorney from which a conflict of interest may result." (10a).

of legal services is both obvious and substantial. Rather, the issue has been from the beginning whether New York's total ban on third-party mailings "directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." 447 U.S. at 556.

In sustaining the ban, first in Greene and then in this case, the New York courts have relied on two separate theories. First, New York has concluded that third-party mailings to real estate brokers raise the possibility, condemned by Ohralik, that some brokers may exert undue pressure on their clients to use a specific attorney. Second, New York has argued that the use of third-party mailings creates a potential conflict of interest that can only be addressed by an absolute prior restraint. Neither justification withstands scrutiny.

Even accepting that petitioners' letter presumed further contact between broker and client, and even assuming that contact would

take the form of personal conversation, it poses none of the dangers which troubled the Ohralik Court. Most importantly, the broker's financial self-interest is not affected by whether his advice about a lawyer is accepted by the client. Thus, there is no reason to believe that the broker will pressure his or her client into a "speedy and perhaps uninformed decision" based on "a one-sided presentation." 436 U.S. at 457. To the contrary, the broker's self-interest is advanced by maintaining the confidence and trust of his or her client. In any event, lawyers should not generally be penalized nor the public denied important information because some real estate brokers may act irresponsibly.

The concern about potential conflicts of interest relates more directly to the attorney but is no more well-focused. As articulated by Greene, a lawyer who accepts referrals from a real estate broker may be less inclined to

antagonize the broker by questioning the marketability of title or disputing the broker's fee. 54 N.Y.2d at 129.[11] However that may be, the ban on all third-party mailings is both grossly underinclusive and overinclusive.

It is underinclusive because a potential conflict of interest is just as likely to arise if the referral is based on a social contact instead of a mailing, but third-party referrals have never been forbidden for that reason. See Ohralik v. Ohio State Bar Association, 436 U.S. at 475 (Marshall, J., concurring). And it is overinclusive for reasons pointed out by this Court in Bates:

> We suspect that, with advertising, most lawyers will behave as they always have. They will abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system. For every attorney who overreaches through advertising, there will be thousands of others who will be candid and

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[11] The analysis in Greene was incorporated by reference in the opinion below. (13 a).

> honest and straightforward. And, of course, it will be in the latter's interest, as in other cases of misconduct at the bar, to assist in weeding out those few who abuse their trust. 433 U.S. at 379.

When regulating First Amendment speech, a closer fit is required between means and ends, Speiser v. Randall, 357 U.S. 513, 525 (1958). Moreover, "[r]estraints on advertising are an ineffective way of deterring shoddy work," Bates v. State Bar of Arizona, 433 U.S. at 378, especially in light of the close regulation to which attorneys are subject. See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 768. The "interference with speech" created by New York's rule in this context is not "in proportion to the interest served." In the Matter of R.M.J., 455 U.S. at 203.

Finally, less restrictive alternatives exist to satisfy the concerns expressed by the New York courts. The state already has the

authority to discipline lawyers for conflicts of interest. Or, if the state were seeking a prophylactic measure, it could have imposed a filing requirement to monitor third-party mailings or insisted on an appropriate disclaimer. Either alternative would have impinged less directly on constitutionally protected speech. The latter alternative has been expressly endorsed by the Kentucky Supreme Court. Kentucky Bar Association v. Stuart, 568 S.W.2d at 934.

This Court's comments in R.M.J. are equally appropriate here. While rejecting a Missouri rule that prohibited, inter alia, the mailing of business cards by attorneys to real estate brokers, this Court stated:

> Mailings and handbills may be more difficult to supervise than newspapers. But again we deal with a silent record. There is no indication that an inability to supervise is the reason the State restricts the potential audience of announcement cards. Nor is it clear that an absolute prohibition is the only solution. For example, by requiring a filing with the

> Advisory Committee of a copy of all general mailings, the State may be able to exercise reasonable supervision over mailings. There is no indication in the record of a failed effort to proceed along such a less restrictive path. 455 U.S. at 206 (footnotes omitted).

Similarly, New York has not demonstrated why it is unable to employ less restrictive means than a total ban on attorney mailings to real estate brokers to achieve reasonable regulation in this area.

Instead, the Court of Appeals attempted to distinguish R.M.J. by characterizing New York's prohibition on third-party mailings as a time, place and manner regulation. A time, place and manner regulation, however, must be content-neutral. See Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975). In this case, as Chief Judge Cooke pointed out, New York is concerned with petitioners' third-party mailing only because of its content. (23a). See Metromedia, Inc. v. San Diego, 453 U.S. 490,

515-16 (1981).

New York's prohibition must therefore be judged in accordance with the standard announced in R.M.J. Applying the rule of R.M.J. -- particularly its emphasis on a factual record to support the suppression of speech -- the decision below cannot be sustained.

III. THE DECISION BELOW OFFENDS DUE PROCESS BY UPHOLDING A DISCIPLINARY SANCTION BASED ON A STATE STATUTE THAT PROVIDES NO NOTICE OF WHAT CONDUCT IT PROSCRIBES.

Petitioners were found guilty of professional misconduct by the New York State courts for violating a section of the Judiciary Law which bans all lawyer advertising. The statute was enacted in 1967, a decade before Bates, and has not been amended. Acknowledging its facial invalidity following Bates, the New York Court of Appeals nonetheless held in Greene that "the section remains effective except as constitutionally proscribed." 54 N.Y.2d at 124.

On remand in this case, the Court of Appeals again rejected petitioners' vagueness challenge to §479. Echoing Greene, the majority held that the provisions of §479 "remain in effect except as they infringe upon constitutionally protected free speech." (14a). While conceding that Greene was not decided until after petitioners' letters were mailed, the majority still concluded that petitioners were "chargeable with knowledge" that their conduct was proscribed by Ohralik and In Re Primus, 436 U.S. 412 (1978), as well as this Court's decisions in NAACP v. Button, 371 U.S. 415 (1963), and Mine Workers v. Illinois Bar Assn., 389 U.S. 217 (1967).

None of the cases cited by the majority below even remotely addressed the constitutionality of third-party mailings by attorneys. More fundamentally, a statute that purports to prohibit all conduct that may be "constitutionally proscribed" without more clearly specify-

ing what conduct it covers forces attorneys to act at their peril. Indeed, petitioners sought and received the assurance of counsel that their mailing was lawful before it was sent.

Fifty years ago, this Court condemned "exaction of obedience to a standard that is so vague and indefinite as to be really no standard at all." Champlin Refining Co. v. Corp. Commission of Oklahoma, 286 U.S. 210, 243 (1932). "[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Thus, "a statute which forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its applica-

tion violates the first essential of due process." Connally v. General Construction Co., 269 U.S. 385, 391 (1926). An attorney wishing to comply with §479 must therefore engage in legal prognostication. Due process forbids such an ad hoc approach to prohibitory rule making. Individuals should know what acts are forbidden before the fact and not only after. Section 479 is thus facially vague and cannot form the basis for petitioners' sanction. See Kolender v. Lawson, ___U.S.___, 103 S.Ct. 1855, 1859 n.8 (1983).

At the very least, fundamental fairness requires that any new interpretation of §479 should be applied only prospectively and not to petitioners whose good faith belief that their actions were lawful has never been disputed.

CONCLUSION

For the reasons stated herein, this Court should grant the petition for a writ of certiorari and summarily reverse the judgment below. In the alternative, certiorari should be granted and this case scheduled for plenary review.

Respectfully submitted,

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DATED:
New York, New York
January 20, 1984

APPENDIX

STATE OF NEW YORK
COURT OF APPEALS

In the Matter of Committee on Professional Standards, Third Judicial Department,

Respondent,

Donald A. Alessi and John P. Bartolomei, attorneys,

Appellants,

et al.,

Respondents.

MEYER, J.

The United States Supreme Court having vacated our prior order in this matter and remanded for further consideration in light of its decision in In re R.M.J. (455 US 191), we conclude that there is no constitutional infirmity in the application of section 479 of the Judiciary Law and provisions of the Code of Professional Responsibility to respondents' conduct in approving the mailing by the legal clinic in which respondents are partners to some 1,000 realtors in the Albany area of a letter quoting

fees for listed real estate transactions. The order of the Appellate Division finding respondents guilty of misconduct in so doing but imposing no sanction is, therefore, affirmed.

I

The committee's petition to the Appellate Division alleged that respondents were admitted to practice in New York, were partners in the Legal Clinic of Cawley and Schmidt, and were guilty of professional misconduct in that they approved for mailing on the letterhead of the clinic a letter, the body of which is set forth in Appendix A of this opinion and the intent of which was to solicit engagement to render legal services in connection with real estate closings, which letter was mailed in August and September of 1979 to approximately 1,000 realtors in the Albany geographical area.

Respondents' motion to dismiss the petition was denied on the basis of our holding in Matter of Greene (54 NY2d 118) that to the extent that section 479 of the Judiciary Law and DR2-103(A) of the Code of Professional Responsibility proscribe advertising of attorneys' services by direct mail addressed to real estate brokers, those provisions are a constitutionally valid regulation of commercial speech. After the Supreme Court's denial of certiorari in Greene (455 US 1035), respondents served their answer denying misconduct or that the intent of the letter was to solicit real estate closings, but otherwise admitting the allegations of the petition. The answer pleaded as complete defenses that respondents' conduct was constitutionally protected free speech, that section 479 of the Judiciary Law on its face forbids all lawyer advertising and thus proscribes constitutionally protected speech, that section 479 on its face violates due process because

not all lawyer advertising can be proscribed and the section fails to give sufficient notice of what lawyer advertising is in fact proscribed, and that section 479 as applied to respondents violates due process in that the section was not interpreted to apply to respondents' conduct until after their letter was sent. It pleaded, further, in mitigation, their assumption based on advice of counsel that their mailing was a permissible form of lawyer advertising.

Respondents then moved to refer the issues raised by the pleadings for a hearing. The Appellate Division denied that motion[1]

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1. Other than denial of the legal conclusion that they were guilty of misconduct, respondents denied only the allegation of Specification 2 that "The intent of said letter was to solicit real estate closings through the realtors of prospective purchasers and sellers of real property." The intent of the letter is, however, a matter of interpretation of its words in light of the circumstances of its transmission. For the reasons stated in Matter of Greene (54 NY 2d 118, 126), we agree that the necessary implication of transmittal of the letter to real estate brokers was to have clients of the brokers referred to respondents for legal work. We agree with the Appellate Division, therefore, that no hearing was required.

and found respondents guilty of misconduct but, noting that the letters were sent prior to the Appellate Division decision in Greene and in apparent good faith reliance on Bates v. State Bar of Arizona (433 US 350, determined that no sanction should be imposed (88 AD2d 1089). Respondents' appeal to our court was dismissed (58 NY2d 689) for want of a substantial constitutional question, but, as already noted, the Supreme Court thereafter granted respondents' petition for certiorari, vacated our order and remanded for further consideration (___US___, 103 S Ct 1763).

Respondents now characterize our construction of the governing statute and disciplinary rule in Matter of Greene as a ban on all third-party mailings by attorneys and argue that what is regulated is the content rather than the manner of speech, which under R.M.J. is permissible only "where the particular advertising is inherently likely to deceive or where the record indicates that a particular

form or method of advertising has in fact been deceptive" (455 US at 202). They suggest, further, that because Greene was decided after their letter was mailed, their due process right to specificity in the statute controlling their advertising activity has been violated. In our view the first argument misconstrues both our Greene decision and the scope of the Supreme Court's holding in In re R.M.J., and the second overlooks Supreme Court First Amendment cases decided prior to respondents' mailing as well as governing due process law.

II

Phrased as it is in terms of deception, the first argument all but ignores the crux of the holding in Greene which was that there is "a substantial governmental interest in preventing conflicts of interest in attorney-client relationships which the statute directly protects and for which there is no adequately protective less restrictive alternative." That holding was supported by citations to

Matter of Primus (436 US 412),[2] Ohralick v. Ohio State Bar Assn. (436 US 447), NAACP v. Button (371 US 415) and Mine Workers v. Illinois Bar Assn. (389 US 217), all of which establish the substantiality and propriety of the interest. It was, moreover, pointed out that although the potential for conflict had played a part in sustaining a limitation on speech only in Ohralick, the other cases had turned on the broader protection afforded associational activity or, as in Primus, "political expression and association," in the context of which "a State must regulate with significantly greater precision" (436 US at 438). Here, of course, neither political expression nor associational activity is involved.

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2. Additional references in Primus to conflict of interest, as well as misrepresentation, as properly subject to governmental control, will be found at 436 US 426, 532 and 437.

That the R.M.J. opinion speaks in terms of deception and makes no mention of conflict of interest is not surprising, conflict of interest being totally unrelated to the advertising under consideration in that case. To read R.M.J. as restricting to deception the activity that may be controlled is, however, to attribute to the court the unlikely intent to overrule Primus, NAACP and Mine Workers sub silentio and to ignore entirely the citation in the R.M.J. opinion of Ohralick (455 US at p. 202).

Nor can it properly be said that the regulation is of all third-party mailings. The Greene opinion expressly limited its "ruling to third-party mailings to brokers" (54 NY2d at 126). Although it also noted that the regulation was of "all third-party mailings, not just mailings to brokers" (id.), that statement must be read in its context, which limits it to third-party mailings involving a conflict of interest. Thus, the regulation was

held to be of manner rather than content because of the "detriment to society in the potential conflict of interest that may be generated when those in need of legal services are approached indirectly through a broker" (id., emphasis supplied), and the associational activity cases were distinguished on the basis of "the absence of monetary stakes for the union or other community group" (id., at 128), without which there would be no significant danger of conflict or overreaching (Woll v. Kelley, 409 Mich. 500, 550, on remand 116 Mich App 791; see In re Primus, 436 US at 429-431, supra).

Unlike the statute involved in Bolger v. Youngs Drug Products Corp. (__ US __, 103 S Ct 2875), which prohibited the mailing of unsolicited advertisements for contraceptives, the regulatory provisions here in issue, as limited by our holdings in Matter of Koffler (51 NY2d 140) and Matter of Greene, supra, impose no general ban upon all mailings by

attorneys to others than potential clients. What is proscribed is mailing to that limited number of third persons who themselves may have dealings with potential clients of the attorney from which a conflict of interest may result. Wholly unrelated to the content of the letter, the proscription is not against the attorney making known to potential clients the availability of his services or even to his doing so through third parties, but against his doing so in a particular manner: through a third party whose interests may be more closely intertwined with those of the attorney than with those of the client. But the proscription would not foreclose a solicitation such as those involved in the NAACP, Mine Workers and Primus cases, all supra (see also Ann: 5 ALR4th 866, 877), because such a solicitation presents no potential for conflict of

interest.[3] For like reason the fact that a title company remains free to solicit referral business from real estate brokers is simply irrelevant.[4]

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3. See Schaumburg v. Citizens for Better Environment (444 US 620, 637, n 11), pointing out that charitable solicitation because not so inherently conducive to fraud and overreaching as is attorney solicitation could not be prohibited. For like reason the fact, noted in footnote 2 of Chief Judge Cooke's dissent, that there is no proscription against an attorney representing a client referred by a broker, does not invalidate the regulation under consideration. The potential for conflict is substantially greater when it is the lawyer who seeks client referrals from the broker than when the broker, unsolicited, refers a client to an attorney.

4. To the extent that the argument raises equal protection clause objections, as respondents' citation of Carey v. Brown (447 US 455) and Police Department of Chicago v. Mosley (408 US 92) suggests, the issue is not properly before us, respondents' answer having raised only free speech and due process defenses.

Nor do we read R.M.J. as invalidating the proscription as thus defined, as the dissents suggest, because it concerns a potential rather than an actual conflict or specific detriment to a particular client. The Supreme Court held in Ohralick, supra, that where a lawyer's exercise of judgment on behalf of his client may be clouded by his own pecuniary self-interest and the transaction is not visible or open to public scrutiny, or otherwise subject to effective oversight, the State may constitutionally impose a prophylactic measure whose objective is the prevention of harm before it occurs (436 US at 461, 464-67; see also In re Primus, 436 US at 434). Far from repudiating that concept, the Court in In re R.M.J. noted that in Ohralick "the Court held that the possibility of 'fraud, undue influence, intimidation, overreaching, and other forms of' "vexatious conduct"' was so likely in the context of in-person solicitation, that such solicitation could be prohibited" (455 US at

202, emphasis supplied). We have spelled out in Matter of Greene (54 NY2d at 129), and need not now repeat, how the prohibition of third-party mailings by attorneys to recipients whose client-referrals may involve the recipient and the attorney in a conflict detrimental to the interests of the client relates to the governmental interest, and why it is not more extensive than necessary to serve that interest. We add only, in light of respondents' suggestion that even a client-referral based on social contact may involve a conflict of interest, that it is not unreasonable for the State to conclude that broker-referrals will more often than not result in conflict but that social-referrals are not inherently conducive of conflict (Ohralick v. Ohio State Bar Assn., 436 US at 466, supra; Schaumburg v. Citizens For Better Environment, loc cit supra, n. 3).

III.

Although respondents have a right to fair notice of the acts for which they can be punished, they had notice from section 479 of the Judiciary Law and DR2-103(a) of the Code of Professional Responsibility that all solicitation of legal business was proscribed and, as we noted in Matter of Greene (54 NY2d at 124), those provisions remain in effect except as they infringe upon constitutionally protected free speech. True, respondents did not have the benefit of either Matter of Koffler (51 NY2d 140) or Matter of Greene (54 NY2d 118, supra) before their letter was sent, but they were then chargeable with knowledge from Ohralick and Primus, both decided by the Supreme Court on May 30, 1978, and its earlier decisions in NAACP and Mine Workers, that the constitutional invalidity of section 479 did not necessarily extend to solicitation involving personal contact and the potential for conflict of interest.

In the light of that knowledge and the long-standing absolute legislative proscription, respondents' fair notice rights were not violated (People v. Epton, 19 NY2d 496, 506, remittitur amended 19 NY2d 1017, app dismd and cert den 390 US, reh den 390 US 876, second reh den 398 US 944; Dombrowski v. Pfister, 380 US 479, 941 n 7; see Rose v. Locke, 423 US 48; Woll v. Kelley, 409 Mich at 544, supra). Application of Greene's construction to conduct occurring prior to that construction involves no violation of respondents' due process right when, as is here the case, it is clear that respondents' conduct has been judged not by the legislative standard alone but by that standard as constitutionally limited (see Shuttlesworth v. City of Birmingham, 382 US 87, 92).

For the foregoing reasons, the order of the Appellate Division should be affirmed, with costs.

COOKE, Ch. J. (dissenting)

I respectfully dissent. A per se prohibition of direct-mail lawyer advertising to real estate brokers cannot be sustained under the First Amendment free speech clause, particularly in view of the Supreme Court's instruction in this case to reconsider the rule embraced in Matter of Greene (54 NY 2d 118) in light of its decision in In re R.M.J. (455 US 191).

The majority reasons that direct-mail advertisement of legal services to real estate brokers, regardless of how it is framed, necessarily involves a request by the attorney to the broker to solicit the latter's prospect to employ the advertising attorney's services (see Matter of Greene, supra at p. 126). This, in turn, gives rise to an attorney's potential conflict of interest between the client and the referring broker. This conflict is said to manifest itself and cause injury to the client through "[the possibility that the lawyer's

view of marketability of title may be colored by his knowledge that the referring broker normally will receive no commission unless title closes, the improbability that the attorney will negotiate to the lowest possible level the commission to be paid to the broker who is an important source of business for him (or suggest to the client that he do so), [and] the probability that the lawyer will not examine with the same independence that he otherwise would the puffery that the broker has indulged in to bring about the sale" (id. at p. 129). In the majority's view, the appropriate means to obviate these potential harms is an absolute ban on direct-mail lawyer advertising to real estate brokers.

This restriction on the attorney's constitutional right to advertise (see In re R.M.J., 455 US 191, supra; Bates v. State Bar of Arizona, 433 US 350; Matter of Koffler, 51 NY2d 140) is characterized as a reasonable time,

place and manner restriction, rather than a content-based restriction (see slip opn at p. 5; Matter of Greene, 54 NY2d, supra at pp. 126-127) because "[w]holly unrelated to the content of the letter, the proscription is not against the attorney making known to potential clients the availability of his services or even to his doing so through third parties, but against his doing so in a particular manner: through a third party whose interests may be more closely intertwined with those of the attorney than with those of the client" (see slip opn at pp. 5-6). As a mere restriction on the manner of speech, the majority argues that the regulation may be sustained under the First Amendment because an attorney has effective alternative means of advertising and the regulation is rationally related to the advancement of the State's interest in protecting clients against retaining attorneys with a conflict of interest (see slip opn at pp. 6-7; Matter of Greene, supra at pp. 126-127).

The majority's analysis errs in fundamental respects.

It is true that the State may place restrictions on the time, place and manner of protected speech so long as such a restriction is reasonable (see Consolidated Edison Co. of N.Y. v. Public Service Comm'n. of N.Y., 447 US 530, 536). To be considered a time, place or manner restriction, however, a restriction "must be 'applicable to all speech irrespective of content'" (id., quoting Erznoznik v. City of Jacksonville, 422 US 205, 209). Thus, the government may regulate how, when, or where a message is delivered, but only without reference to the message's substance (see Grayned v. Rockford, 408 US 104, 115; Cox v. Louisiana, 379 US 536, 554). For example, the State may restrict large street demonstrations to times other than rush hour as a reasonable time and place regulation stemming from its interest in public safety and order (see Cox v. Louisiana,

supra). Similarly, the State, as a reasonable restriction on the manner of speech, may require that the use of "overamplified loudspeakers" be modulated to protect its interest in public peace (see Grayned v. Rockford, 408 US 104, 116, supra; Kovacs v. Cooper, 336 US 77, 87). Such regulations, to be enforceable, must be, as mentioned, neutral in terms of the content of speech, and "must be narrowly tailored to further the State's legitimate interest" (Grayned v. Rockford, supra at pp. 116-117).

Time, place, or manner regulations are evaluated under a less rigorous standard than content-based restrictions (see Linmark Associates v. Willingboro, 431 US 85, 93). If the former is reasonable, and rationally related to a legitimate State interest, it will be upheld so long as there exist effective alternate means of communication (see Virginia Board of Pharmacy v. Va. Citizens Consumer Council, 425 US 748, 771). For a content-based

restriction to be sustained, at least with respect to protected, non-misleading commercial speech,[1] the State must assert a substantial State interest and the restriction may extend only in proportion to the degree the interest is served (see In re R.M.J., supra; Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n. of N.Y., 447 US 557, 566). Moreover, the State must show that there are no less-restrictive means of regulation (Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n. of N.Y., supra at p. 566).

1. Content-based restrictions on non-commercial speech will be sustained "only in the most extraordinary circumstances" (Bolger v. Youngs Drug Products Corp., ___US___, ___, 103 S Ct 2875, 2879 [footnote omitted]).

When the State seeks to restrict the time, place, or manner of speech with reference to a particular type of message such a regulation has been held to be an attempt to control content (see Consolidated Edison Co. of N.Y. v. Public Service Comm'n. of N.Y., 447 US at p. 537, supra; Erznoznik v. City of Jacksonville, 422 US at p. 209, supra; Police Dept. of Chicago v. Mosley, 408 US 92, 95). For example, regulations have been struck down as content-based restrictions when they prohibited placing "For Sale" signs of residential property but not signs with other messages (see Linmark Associates v. Willingboro, 431 US 85, 93-94, supra), prohibited exhibiting movies that are visible from a public street only when the movie contains nudity (Erznoznik v. City of Jacksonville, supra), and prohibited inserting messages in utility bills only when the insert addresses a controversial public issue (Consolidated Edison Co. of N.Y. v. Public Service Comm'n. of N.Y., supra).

In analyzing the present case, certain basic factors are noted. The subject regulation is plainly content-based. Although, indeed, it regulates a manner of speech, the regulation is not, as the majority contends, "[w]holly unrelated" to the speech's content. The restriction is invoked solely by reason of the message's nature--attorney advertising. "That the proscription applies only to one mode of communication***does not transform this into a 'time, place, or manner' case" (Linmark Associates v. Willingboro, supra at p. 94).

Moreover, there is no claim here that the advertisement was false or misleading. The message itself was not unlawful. The court is concerned here only with whether a lawyer's protected right to advertise may be restricted by an absolute ban on direct-mail advertising to real estate brokers.

For the regulation to be consistent

with First Amendment protections, "the State must assert a substantial interest and the interference with speech must be in proportion to the interest served. Restrictions must be narrowly drawn, and the State lawfully may regulate only to the extent regulation furthers the State's substantial interest" (In re R.M.J., 455 US 191, 203, supra [citation and footnote omitted]). It may be assumed that the State's interest in protecting individuals from retaining attorneys with conflicts of interest is substantial. The issue, therefore, narrows to whether the regulation may be said to reasonably advance this interest and, if so, whether the degree to which the interest is advanced justifies the interference with petitioner's First Amendment right to advertise.

The State has not established that the problem asserted actually exists or that it has attempted to control the problem through less restrictive means that have failed (cf. In re R.M.J., supra at p. 206). This concept

that the regulation of lawyer advertising must be related to a State interest and should proceed on a least restrictive path is the import of the Supreme Court's decision in In re R.M.J. (supra). It is true, as the majority points out, that much of that case involved questions of whether the ethical rules of the Supreme Court of Missouri that regulate lawyer advertising were a proper means of protecting against potentially deceptive advertising. But many of the rules prohibited absolutely the inclusion of certain information in advertising (see In re R.M.J., supra at pp. 193-195.) And, in each instance, the rigid formulation of the State rules were found not sufficiently related to the interests of the State to be upheld (id. at pp. 205-206). Of particular relevance to this appeal was the Court's review of a rule that permitted the mailing of professional announcement cards only to "lawyers, clients, former clients, personal friends, and relatives" (id. at p. 196). The

Court would not sustain the rule because no interest or established problem was proffered to justify the limitation, and even assuming any interest existed, there was no indication that that problem could not be attended in a less restrictive means.

The blunt conclusion that all direct-mail lawyer advertisements to brokers necessarily pose a grave potential threat that, in the event that a referral results from the advertisement, the lawyer will not act in the best interests of the client is unsubstantiated. Similarly, the assertion that the complete prohibition of direct-mailings to brokers will mitigate conflicts of interest not otherwise deterred is unrealistic. These points are self-evident and have been made before (see Matter of Greene, 54 NY2d 118, 133-135, supra [Fuchsberg, J., dissenting]). It need only be reiterated here that the rule announced in Matter of Greene (supra) and reaffirmed in

this appeal does not advance any substantial State interest.[2]

In any event, the rule as drawn interferes with free speech disproportionately to the interest it purportedly furthers. In the present case, the ban on direct-mail advertisements to brokers is complete. It is imposed irrespective of whether the intent of the advertisement, as indicated by its text, is to seek the referral of clients or is merely to give notice of the availability of the lawyer's services (see slip opn at p. 3, n. 1; Matter of Greene, 54 NY2d 118, 126, supra). In the majority's view, the lawyer's request for referral is a "necessary implication" of any advertisement sent to a broker,

2. It is noteworthy that, as a general matter, attorneys need not decline to represent a client who has been referred by a broker (see, generally, DR 2-105; DR 2-109; DR 5-101, nor are they proscribed from placing non-misleading advertisements in publications whose primary readership may be real estate brokers (see, generally, DR 2-100--2-101).

whether it be a mere notice of the opening of a law office (see In re R.M.J., 455 US at 206, supra) or a neutral statement of the services provided by a law office or lawyer. To the extent that the rule does not differentiate between (1) advertisements that relate solely to disseminating neutral information and (2) advertisements that intimate that the broker should intercede as an intermediary and actively solicit on behalf of the lawyer, it constitutes an unjustified imposition on a lawyer's right to advertise (see In re R.M.J., supra; In re Primus, 436 US 412; Bates v. State Bar of Arizona, 433 US 350, supra). Moreover, any asserted interest in mitigating potential conflicts of interest in the attorney-client relationship would be as adequately served by the less restrictive means of, for example, reviewing mailings to brokers to ensure they do not include such intimations (see In re R.M.J, supra; Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n. of N.Y.,

447 US 557, 566, supra).

Accordingly, the order of the Appellate Division should be reversed and the petition dismissed.

KAYE, J. (dissenting)

Advertising by attorneys may be regulated only where the advertising in question is inherently deceptive, or where there is a finding that a particular method of advertising has in fact been deceptive or subject to abuse. (In re R.M.J., 455 US 191, 202-203.) Here, there is no contention that respondents' advertising is inherently deceptive or misleading. The clear direction of R.M.J. is that, in such situations, prohibition of advertising can be sustained only when the record establishes that the method of advertising is in fact misleading or subject to abuse (455 US at 207).

There is no finding that respondents' method of advertising is in fact misleading or

subject to abuse. On this point, the majority states only that the predicate for the prohibition of respondents' advertising was spelled out in Matter of Greene (54 NY2d 118). But there is no finding in Greene that this method of advertising is in fact misleading or subject to abuse. The decision in Greene to prohibit such advertising was based on the possibility that the lawyer's view of marketability of title may be colored, the improbability that the attorney will negotiate the lowest possible broker's commission, and the probability that the lawyer will not examine the broker's puffery with the independence he otherwise would (54 NY2d at 129). It is clear from R.M.J. that prohibition of attorney advertising cannot be founded on such hypothesis.

Since the ban imposed on respondents' advertising lacks any factual predicate, there is no need to reach the questions of whether some less restrictive alternative would

address the imagined potential for conflict.

* * * * * * * * *

Following remand by the United States Supreme Court and reinstatement of the appeal herein by this Court, order affirmed, with costs. Opinion by Judge Meyer in which Judges Jasen, Jones, Wachtler and Simons concur. Chief Judge Cooke and Judge Kaye dissent and vote to reverse in separate dissenting opinions.

Decided November 3, 1983.

SUPREME COURT OF THE UNITED STATES

No. 82-1399

Donald A. Alessi and John P. Bartolomei,

Petitioners,

v.

Committee on Professional Standards, Third Judicial Department

ON WRIT OF CERTIORARI to the Court of Appeals of New York.

THIS CAUSE having been submitted on the petition for a writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs, and that this cause is remanded to the Court of Appeals of New York for further consideration in light of In Re R.M.J., 455 U.S. 191 (1982).

IT IS FURTHER ORDERED that the

petitioners, Donald A. Alessi and John P. Bartolomei, recover from Committee on Professional Standards, Third Judicial Department, Two Hundred Dollars ($200.00) for their costs herein expended.

April 18, 1983

Clerk's costs: $200.00

UNITED STATES OF AMERICA, ss:

THE PRESIDENT OF THE UNITED STATES

OF AMERICA

To the Honorable the Judges
of Court of Appeals of
New York.

GREETINGS:

WHEREAS, lately in the Court of Appeals of New York, there came before you a cause entitled In the Matter of Donald A. Alessi, John P. Bartolomei, et al., Attorneys--Committee on Professional Standards, Third Judicial Department, Respondent, and Donald A. Alessi and John P. Bartolomei, Appellants, and et al., Respondents, wherein the judgment of the said Court of Appeals was duly entered on the eighteenth day of November, 1982, as appears by an inspection of the petition for writ of certiorari and response thereto.

AND WHEREAS, in the 1982 Term, the said cause having been submitted to the SUPREME COURT

OF THE UNITED STATES on the said petition for writ of certiorari and response thereto, and the Court having granted the said petition.

ON CONSIDERATION WHEREOF, it was ordered and adjudged on April 18, 1983, by this Court that the judgment of the said Court of Appeals in this cause is vacated with costs, and that this cause is remanded to the Court of Appeals of New York for further consideration in light of In Re R.M.J., 455 U.S. 191 (1982).

IT IS FURTHER ORDERED that the petitioners, Donald A. Alessi and John P. Bartolomei, recover from Committee on Professional Standards, Third Judicial Department, Two Hundred Dollars ($200.00) for their costs herein expended.

NOW, THEREFORE, THE CAUSE IS REMANDED to you in order that such proceedings may be had in the said cause, in conformity with the judgment of this Court above stated, as accord

with right and justice, and the Constitution and Laws of the United States, the said writ notwithstanding.

Witness the Honorable WARREN E. BURGER, Chief Justice of the United States, the-----18th------day of-----May-----in the year of our Lord one thousand nine hundred and eighty-three.

Costs of Donald A. Alessi and
John P. Bartolomei
Clerk's costs: $200.00

/s/Alexander L. Stevas
Clerk of the Supreme Court
of the United States

No. 82-1399

Donald A. Alessi and John P. Bartolomei

v.

Committee on Professional Standards,
Third Judicial Department

COURT OF APPEALS
STATE OF NEW YORK

In the Matter of Donald A. Alessi, John P. Bartolomei, et al., Attorneys.

Committee on Professional Standards, Third Judicial Department, Respondent,

Donald A. Alessi and John P. Bartolomei, Appellants, et al., Respondents.

The appellants having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

Joseph W. Bellacosa
Clerk of the Court

November 18, 1982

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

IN THE MATTER OF :

DONALD A. ALESSI, AN ATTORNEY, :
JOHN P. BARTOLOMEI, AN ATTORNEY,
HENRY PEDICONE, JR., AN ATTORNEY, :
LINDA ZABLOTNY, AN ATTORNEY,

Respondents, ORDER

and

COMMITTEE ON PROFESSIONAL STANDARDS,

Petitioner.

A disciplinary proceeding having been instituted in this court upon the petition of the Committee on Professional Standards in respect to Donald A. Alessi, an attorney and counselor at law, who was admitted to practice by the Appellate Division of the Supreme Court, Fourth Judicial Department, on July 16, 1970, John P. Bartolomei, an attorney and counselor at law, who was admitted to practice by the Appellate Division of the Supreme Court, Fourth Judicial Department, on April 8, 1970,

Henry Pedicone, Jr., an attorney and counselor at law, who was admitted to practice by the Appellate Division of the Supreme Court, Second Judicial Department, on October 13, 1976, Linda Zablotny, an attorney and counselor at law, who was admitted to practice by the Appellate Division of the Supreme Court, Fourth Judicial Department, on September 12, 1977; the petition praying that the respondents be disciplined for professional misconduct upon the charges therein set forth; the proceeding having come on before this court by a notice of petition, dated April 22, 1981; and the respondents having filed an answer thereto; and the respondents having moved by notice of motion, dated May 14, 1982, to refer the issues raised by the pleadings to a judge to hear and report;

Now, on reading and filing the said petition, verified April 22, 1981, the said answer, verified April 9, 1982; the respondents' notice

of motion and the affidavit of Richard G. Collins in support of said motion, and upon all the papers filed herein; and, after due deliberation, the Court having rendered a decision on the 22nd day of June, 1982, it is

ORDERED that the motion to refer the issues raised by the pleadings to a judge to hear and report is denied, and it is further

ORDERED that respondents are guilty of misconduct in permitting or approving the mailing of letters to realtors as alleged in the petition, no sanctions shall be imposed for such misconduct.

John J. O'Brien
Clerk of the
Appellate Division

DATED AND ENTERED:
August 3, 1982

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

In the Matter of DONALD A. ALESSI, JOHN P. BARTOLOMEI, HENRY PEDICONE, JR., and LINDA ZABLOTNY, Attorneys,

Respondents.

COMMITTEE ON PROFESSIONAL STANDARDS, THIRD JUDICIAL DEPARTMENT,

Petitioner.

Respondents Alessi, Bartolomei and Zablotny were admitted to the Bar by the Appellate Division, Fourth Judicial Department, on July 16, 1970, April 8, 1980 and September 12, 1977, respectively. Respondent Pedicone was admitted by the Appellate Division, Second Judicial Department, on October 13, 1976.

The petition in this disciplinary proceeding charges that respondents, as partners or employees of a legal clinic with an office in Albany, in violation of section 479 of the Judiciary Law and DR 2-103(A) of the Code of Professional Responsibility, permitted or

approved the mailing of approximately 1,000 letters to realtors in the Albany area during August and September 1979 soliciting, through the realtors, real estate closings of prospective purchasers and sellers of real property.

Respondents moved to dismiss the petition on the ground that the mailings were a valid exercise of their constitutional right. to freedom of expression. Since Matter of Greene (78 AD2d 131), a similar case involving direct mail addressed to real estate brokers, was then on appeal to the Court of Appeals, we directed that the motion to dismiss be held pending determination of the appeal. On October 29, 1981 the Court of Appeals affirmed Greene, holding that section 479 of the Judiciary Law and DR 2-103(A) of the Code, to the extent that they proscribe advertising of attorneys' services by direct mail addressed to real estate brokers, are constitutional (54 N.Y.2d 118). We then denied the motion to

dismiss and an answer was filed by respondents after the United States Supreme Court denied a petition for a writ of certiorari in Greene (___ U.S. ___, 50 U.S.L.W. 3766).

Respondents now move to refer the issues raised by the pleadings to a judge to hear and report. We determine that a reference is unnecessary and we find respondents guilty of misconduct in permitting or approving the mailing of letters to realtors as alleged in the petition. However, since the letters were apparently sent in good faith in reliance on Bates v. State Bar of Arizona (433 U.S. 450) and prior to the decision of the Second Department in Greene, we determine that no sanction should be imposed for such misconduct.

MAHONEY, P.J., SWEENEY, KANE, MAIN and CASEY, JJ., concur.

June 22, 1982

At a Term of the Appellate Division of the Supreme Court in and for the Third Judicial Department, held at the Justice Building in the City of Albany, New York, commencing on the 14th day of December, 1981

PRESENT:

HON. A. FRANKLIN MAHONEY,
Presiding Justice,
HON. MICHAEL E. SWEENEY,
HON. T. PAUL KANE,
HON. ROBERT G. MAIN,
HON. JOHN T. CASEY,
Associate Justices.

In the Matter of DONALD A. ALESSI, JOHN P. BARTOLOMEI, HENRY PEDICONE, JR. and LINDA ZABLOTNY, Attorneys,

Respondents.

COMMITTEE ON PROFESSIONAL STANDARDS, THIRD JUDICIAL DEPARTMENT,

Petitioner.

The Committee on Professional Standards having filed a petition containing charges of professional misconduct against respondents and respondents having moved for an order dismissing

the petition, and the Court having directed on July 1, 1981 that the motion be held pending determination of the appeal in Matter of Greene by the Court of Appeals;

Now, on reading and filing the petition of the Committee on Professional Standards, verified April 22, 1981; and respondents' notice of motion dated June 3, 1981, and the affidavit of Richard G. Collins, Esq., attorney for respondents, sworn to June 29, 1981, in support of the motion; and, after due deliberation, the court having rendered a decision on the 15th day of January, 1982, it is

ORDERED that the motion to dismiss petition be and the same hereby is denied, with leave to the respondents to file and serve an answer within 20 days after service of a copy of this order.

John J. O'Brien
Clerk

DATED AND ENTERED:
January 15, 1982

CONFIDENTIAL - NOT FOR PUBLICATION

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

In the Matter of DONALD A. ALESSI, JOHN P. BARTOLOMEI, HENRY PEDICONE, JR., and LINDA ZABLOTNY, Attorneys,

Respondents.

COMMITTEE ON PROFESSIONAL STANDARDS, THIRD JUDICIAL DEPARTMENT,

Petitioner.

Motion to dismiss petition denied (Matter of Greene, ___ N.Y.2d ___ [Oct. 29, 1981]), affg. 78 AD.2d 131), with leave to the respondents to file and serve an answer within 20 days after service of a copy of the order to be entered hereon.

MAHONEY, P.J., SWEENEY, KANE, MAIN and CASEY, JJ., concur.

January 15, 1982

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

IN THE MATTER OF

DONALD A. ALESSI, AN ATTORNEY,
JOHN P. BARTOLOMEI, AN ATTORNEY,
HENRY PEDICONE, JR., AN ATTORNEY,
LINDA ZABLOTNY, AN ATTORNEY,

Respondents,

and

COMMITTEE ON PROFESSIONAL STANDARDS,

Petitioner.

ANSWER

The Respondents, Donald A. Alessi, John P. Bartolomei, Henry Pedicone and Linda Zablotny, answering the petition herein:

1. Admit those allegations contained in paragraphs numbered "1," "2" (except that Respondent Alessi now maintains an office for the practice of law at 305 Elmwood Avenue, Buffalo, New York 14222 instead of 732 Brisbane Building, Buffalo, New York 14203), "3" (except that Respondent Bartolomei now maintains an office for

the practice of law at 335 Buffalo Avenue, Niagara Falls, New York 14303 instead of 755 Center Street, Lewiston, New York 14092), "4" and "5" of the petition and those allegations contained in specifications numbered "I," "3," "4," "5," "6" and "7" in the petition.

2. Deny those allegations contained in paragraph numbered "6" in the petition, those allegations contained in specification numbered "2" in the petition, and each and every other allegation in said petition not hereinbefore otherwise specifically admitted or denied.

FOR A FIRST, SEPARATE AND COMPLETE DEFENSE TO THE PETITION, AND OBJECTION IN POINT OF LAW, THE RESPONDENTS ALLEGE:

3. Respondents' conduct as alleged in the petition was constitutional free speech protected under the First and Fourteenth Amendments of the United States Constitution and Article 1, sections 6 and 8 of the New York State Constitution.

FOR A SECOND, SEPARATE AND COMPLETE DEFENSE TO THE PETITION, AND OBJECTION IN POINT OF LAW, THE RESPONDENTS ALLEGE:

4. Section 479 of the Judiciary Law is violative of the First and Fourteenth Amendments of the United States Constitution and Article 1, sections 6 and 8 of the New York State Constitution in that it forbids on its face all lawyer advertising and thus seeks to proscribe constitutionally protected free speech.

FOR A THIRD, SEPARATE AND COMPLETE DEFENSE TO THE PETITION, AND OBJECTION IN POINT OF LAW, THE RESPONDENTS ALLEGE:

5. Section 479 of the Judiciary Law on its face is violative of the Fourteenth Amendment to the United States Constitution and Article 1, section 6 of the New York State Constitution in that not all lawyer advertising can be constitutionally proscribed, and section 479 therefore fails to give sufficient advance

notice of what lawyer advertising in fact is proscribed.

FOR A FOURTH, SEPARATE AND COMPLETE DEFENSE TO THE PETITION, AND OBJECTION IN POINT OF LAW, THE RESPONDENTS ALLEGE:

6. As applied to the Respondents in this case, section 479 of the Judiciary Law violates Respondents' constitutional right to Due Process of Law as guaranteed them by the Fourteenth Amendment of the United States Constitution and Article 1, section 6 of the New York State Constitution in that section 479 was not interpreted by any New York court to forbid the conduct with which Respondents are charged until after Respondents allegedly performed their conduct. Because the content of section 479 of the Judiciary Law is neither meaningful nor comprehensible without judicial interpretation, Respondents were given absolutely no advance guidance as to how to conform their conduct to comply with section 479 of the

Judiciary Law.

FOR A FIFTH, SEPARATE AND COMPLETE DEFENSE, AND BY WAY OF MITIGATION, RESPONDENTS ALLEGE:

7. Assuming that section 479 of the Judiciary Law does in fact constitutionally proscribe the conduct with which Respondents are charged, Respondents had no notice of this fact when they participated in the mailing of the letters alleged in the petition since the judicial decision in this State which interpreted section 479 of the Judiciary Law as a ban on Respondents' conduct occurred after Respondents performed their conduct.

8. Respondents at the same time they participated in the letters alleged in the petition were acting on the good faith assumption that such mailings were permissible forms of lawyer advertising. Their assumption was buttressed by a legal opinion they had solicited from their counsel, and their assumption has been endorsed by two judges of the Court of

Appeals in the dissenting opinion of Matter of Greene, 54 N.Y.2d 118, and possibly four justices of the United States Supreme Court in that court's decision of March 23, 1982 to deny a petition for a writ of certiorari in Matter of Greene.

9. Since the conduct with which Respondents are charged in the petition is malum prohibitum rather than malum in se, justice would be served by a dismissal of the petition herein based upon this defense.

10. If the petition is not dismissed, justice would be served by this Court taking no disciplinary action against Respondents based upon this defense.

WHEREFORE, Respondents pray that the Court render a judgment dismissing the proceeding herein on the merits.

Richard G. Collins
Attorney for Respondents
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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

IN THE MATTER OF DONALD A. ALESSI, AN ATTORNEY, JOHN P. BARTOLOMEI, AN ATTORNEY, HENRY PEDICONE, JR., AN ATTORNEY, LINDA ZABLOTNY, AN ATTORNEY,	:	
Respondents,	:	PETITION OF
AND	:	CHARGES AND
COMMITTEE ON PROFESSIONAL STANDARDS,	:	SPECIFICATIONS
Petitioner.	:	

TO THE PRESIDING JUSTICE AND THE ASSOCIATE JUSTICES OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, THIRD JUDICIAL DEPARTMENT:

The Committee on Professional Standards, Third Judicial Department, by George B. Burke, Chief Attorney, respectfully alleges upon information and belief that:

1. Petitioner is a committee duly authorized by the Rules of the Appellate Division, Third Department, to bring this proceeding.

2. Respondent, Donald A. Alessi, was

admitted to practice as an attorney by order of the Appellate Division, Fourth Department, on July 16, 1970 and was a partner in the Legal Clinic of Cawley and Schmidt with administrative offices at 1370 Niagara Falls Boulevard, Tonawanda, New York as well as an office at 1531 Central Avenue, Albany, New York 12205. Respondent Alessi also maintains an office for the practice of law at 702 Brisbane Building, Buffalo, New York 14203.

3. Respondent, John P. Bartolomei, was admitted to practice as an attorney by order of the Appellate Division, Fourth Department, on April 8, 1980 and was a partner in the Legal Clinic of Cawley and Schmidt with administrative offices at 1370 Niagara Falls Boulevard, Tonawanda, New York and an office at 1531 Central Avenue, Albany, New York. Respondent Bartolomei also maintains an office for the practice of law at 755 Center Street, Lewiston, New York 14092.

4. Respondent, Henry Pedicone, Jr., was admitted to practice as an attorney by order of this court on October 13, 1976 and was employed as an attorney for the Legal Clinic of Cawley and Schmidt at 1531 Central Avenue, Albany, New York.

5. Respondent, Linda Zablotny, was admitted to practice as an attorney by order of the Appellate Division, Fourth Department, on September 12, 1977 and was Administrative Attorney for the Legal Clinic of Cawley and Schmidt, 1370 Niagara Falls Boulevard, Tonawanda, New York 14150 and supervised the office maintained by the clinic at 1531 Central Avenue, Albany, New York.

6. Respondents have been guilty of professional misconduct and conduct prejudical to the administration of justice within the meaning of the Judiciary Law, Section 90, subdivision 2 and conduct tending to bring the legal profession into disfavor and disrepute as follows:

CHARGE I

Respondents, individually and collectively, solicited legal business in violation of Disciplinary Rules DR 2-101(A)(B); DR 2-103(A); DR 2-103(E) of the Code of Professional Responsibility and Section 479 of the Judiciary Law.

SPECIFICATION I

During August and September, 1979 approximately 1,000 letters were mailed to realtors in the geographical area serviced by the Albany office of the Legal Clinic of Cawley and Schmidt from the office at 1531 Central Avenue, Albany, New York 12205. A copy of one of the letters is set forth as Exhibit A attached hereto.

SPECIFICATION 2

The intent of said letter was to solicit real estate closings through the realtors of prospective purchasers and sellers of real property on behalf of respondents Donald A.

Alessi, John P. Bartolomei, Henry Pedicone, Jr. and Linda Zablotny.

SPECIFICATION 3

Said form letter was drafted by respondent, Linda Zablotny.

SPECIFICATION 4

Respondent Alessi reviewed and approved said letter for the purpose of the mailing.

SPECIFICATION 5

Respondent Bartolomei reviewed and approved said letter for the purpose of the mailing.

SPECIFICATION 6

Respondent Pedicone allowed his name to be signed to the letter by his secretary for the purpose of the mailing.

SPECIFICATION 7

These mailings were approved by respondents Alessi, Bartolomei and Zablotny.

DATED: April 22, 1981

George B. Burke,
Chief Attorney
Committee on Professional Standards
P. O. Box 7013
Capitol Station Annex
Albany, New York 12225
(518) 474-8816

THE LEGAL CLINICS of Cawley & Schmidt

ATTORNEYS AT LAW

LINDA C. CAWLEY (MD)
WILLIAM R. SCHMIDT (MD)
DONALD A. ALESSI (NY)
JOHN P. BARTOLOMEI (NY)

LINDA A. ZABLOCKI (NY)
JOHN C. MILLER (NY)
KENNETH C. SULLIVAN (NY)
JOHN W. ALLEN (NY)
HENRY L. PEDICONE JR. (NY)
GEORGE M. FEIBER (NY)
ALAN E. FIELITZ (NY)

NEW YORK OFFICES
AMHERST-TONAWANDA
HENRIETTA
SYRACUSE
ALBANY

MARYLAND OFFICES
FELLS POINT
TOWSON
GLEN BURNIE
RIVERDALE
COLUMBIA

BOSTON OFFICES
MALDEN
DUXBURY

TENNESSEE OFFICE
NASHVILLE

ALBANY
1531 Central Avenue
Albany, New York 12205
(518) 869-0595

Dear Realtor:

We recognize that the costs attendant to the sale or purchase of a home are a real concern to your clients that may indeed influence whether a transaction will even take place. The Legal Clinics of Cawley and Schmidt will handle all aspects (buy or sell) of residential real estate transfers at the following affordable attorney's fees:

NY

1. Where purchase price is $30,000 or more $ 295.00

2. Where purchase price is $20,000 or more, but under $30,000 215.00

3. Where purchase price is under $20,000 175.00

These fees are of course exclusive of Seller's disbursements, such as the cost of the search continuation, survey redate, N.Y.S. Transfer Tax Stamps, Recording/filing fees and Broker's Commissions, and, Purchaser's expenses, such as Recording/filing fees, Mortgage Tax and Bank attorney's fees.

Contact us for more information during our convenient office hours:

Monday/Wednesday/Friday	9 AM - 5 PM
Tuesday/Thursday	9 AM - 9 PM
Saturday	9 AM - noon

Very truly yours,

LEGAL CLINIC OF CAWLEY & SCHMIDT

BY: _____

Opinion #16
Issued 10/15/80

THE GRIEVANCE COMMISSION
OF THE
BOARD OF OVERSEERS OF THE BAR

QUESTION

The Grievance Commission has been asked by a lawyer if it would be permissible under the Maine Bar Rules for that lawyer to mail a letter soliciting employment, as follows:

(letterhead)

Dear _____

I understand that your _____ had recently sustained injuries in an accident. It has been my experience that many people are unaware that they may be entitled to compensation for their injuries even in situations such as automobile accidents where it appears that the person seeking compensation was at fault or where it appears that no one was at fault.

I am attempting now to concentrate my practice in the area of cases involving serious

personal injuries or death and probate (settling the affairs of persons who have died). I am attempting this concentration in hopes that it will better allow me to serve the needs of clients who have suffered serious personal injuries or who are the heirs or representatives of persons who have died.

Pursuant to the Maine Bar Rules, Rule 3.9, I am not allowed to make any unwarranted suggestions or promises of benefits or to contact you under circumstances which create a risk of undue influence. If, however, after reviewing my letter and giving careful consideration to the possibility that there may be some right to compensation for the injuries suffered in the recent accident, you wish to contact me or another attorney to check into this matter further feel free to do so.

Should you choose to contact me, you should be aware that it is my practice not to charge for an initial office interview for the

purpose of evaluating whether there may be a potential claim. You should also be aware that the most common types of fee arrangements which I enter into in cases involving serious injuries or death are what are known as contingent fees, in which my fee is based upon a percentage of the amount of compensation recovered for the injured party, or a fee based on an hourly rate. In handling cases on an hourly rate, I simply charge an agreed rate per hour billed monthly to the client. By requirement of the probate courts, all probate cases are handled on an hourly rate.*

In the event that you and the injured party wish to discuss the possibility of securing some compensation for the injuries with me, simply call my secretary and arrange an appointment for a time which is mutually convenient.

Sincerely yours,

*The Commission is doubtful as to the factual accuracy of this statement.

OPINION

Maine Bar Rule 3.9 governs and regulates advertising and solicitation by Maine lawyers. Because the lawyer's letter referred to above is intended to be sent to an individual and pertains to a singular situation involving personal injury, the propriety of the lawyer's conduct in sending the letter is governed by sub-section (f) of that Rule which prescribes the standards by which lawyer solicitation must be measured. Maine Bar Rule 3.9(f) provides:

> (f) Recommendation or Solicitation of Employment.
>
> (1) A lawyer shall not solicit employment on behalf of himself or any lawyer affiliated with him through any form of personal contact:
>
> (i) By using any statement, claim, or device that would violate this rule if part of a public communication;

(ii) By using any form of duress or intimidation, unwarranted suggestions or promises of benefits, or engaging in deceptive, vexatious, or harassing conduct; or

(iii) When the circumstances create an appreciable risk of undue influence by the lawyer or ill-considered action by the person being solicited. Without limitation, such circumstances will be deemed to exist as to the person solicited if he is in the custody of a law enforcement agency or under treatment in a hospital, convalescent facility, or nursing home, or if his mental faculties are impaired in any way or for any reason. Notwithstanding the foregoing, such circumstances shall be deemed not to exist when a lawyer is discussing employment with any person who has, without solicitation by the lawyer or anyone acting

for him, sought the lawyer's advice regarding employment of a lawyer.

(2) A lawyer shall not compensate, or give anything of value to, a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client, except that he may pay for public communication permitted by these rules and may pay the usual and reasonable fees or dues charged by a lawyer referral service operated, sponsored, or approved by a bar association.

(3) A lawyer shall not knowingly assist or authorize any other person or organization to engage in conduct that would violate this rule if engaged in by a lawyer personally, nor shall a lawyer accept employment when he knows, or it is obvious, that the person who seeks

his services does so as a result of conduct prohibited under this rule.

It is the opinion of the Commission that the letter must be treated as an indirect solicitation of the accident victim even though it is addressed to a relative. Since it is the accident victim who has the claim in which the lawyer is interested, it is obvious that the letter is intended to be communicated to him by the recipient. This conclusion is reinforced by the last paragraph of the letter which states that if the addressee or "the injured party" wish to discuss the potential claim with the letter writer, he would be glad to oblige.

It cannot be said, however, that it would be a per se violation of the rule for the lawyer to send the letter in question. Indeed, the letter appears to be carefully drafted with the view to complying with the standards contained in Rule 3.9(f). The

letter itself, however, tells only half the story. Since, as indicated above, the letter must be taken as having been directed to the accident victim, the rule would be violated if it were received by him while under treatment in a hospital or under the other circumstances set forth in sub-section (1)(iii).[1/]

It is conceivable that a lawyer could have made inquiry to satisfy himself that the accident victim had been discharged from the hospital and that the circumstances did not otherwise "create an appreciable risk of undue influence by the lawyer or ill-considered action by the person being solicited." The Commission is of the opinion that the rule would

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1/ The Commission takes this opportunity to observe that the prohibition of Rule 3.9(f)(1)(iii) is framed in terms of "appreciable risk of undue influence by the lawyer or ill-considered action by the person being solicited." Explicit proof or findings of harm or injury is immaterial. See Ohralik v. Ohio State Bar Association, 436 U.S. 447, 98 S.Ct. 1912 (1978).

not be violated if a lawyer had taken such steps to assure that the circumstances deemed in the rule to constitute a violation did not in fact exist even if, by some mischance, as in the case of a sudden relapse by the accident victim, the letter were nevertheless received by him while back in the hospital. The Commission believes that where, despite the fact that reasonable precautions are taken and good faith is exercised by the lawyer, a solicitation inadvertently occurs under circumstances described in sub-section iii, the policy of the rule will be satisfied by simply barring the lawyer from accepting the case if he should later be requested to undertake it.

Oregon Legal Ethics Opinions, No. 431, Page 10, Guideline No. 15. Letters.

> Subject to the rules and guidelines relating to solicitation and to the content of advertising, a lawyer may advertise by mailing letters.

Discussion: Letters as forms of advertising have presented difficult problems, perhaps because they can be subject to abuse as a substitute for in-person solicitation. If letters are otherwise proper in content, and are properly distributed, they are permissible advertisements. See Kentucky Bar Assoc. v. Stuart, 568 SW2d 933 (Ky. 1978) (letters mailed to real estate agencies setting forth fees for routine legal services and other information did not constitute impermissible solicitation). Letters that contain improper content or are distributed in an improper manner so as to constitute prohibited solicitation, are not allowed.

(January 1, 1981)

ADVISORY COMMITTEE ON PROFESSIONAL ETHICS

Appointed by the Supreme Court of New Jersey

Opinion 468
Advertising - In
Various Forms

The inquirer poses questions of appropriateness of various forms of advertising by lawyers since the decision of the U.S. Supreme Court in Bates v. State Bar Association of Arizona, 433 U.S. 350, 53 L.Ed.2d 810 (1977). While the Court there upheld the First Amendment right of lawyers to advertise their services, it went on to declare that such advertising must not be false, deceptive or misleading and if it is, it may be restrained. It said at page 836:

> ***"as with other varieties of speech, it follows as well that there may be reasonable restrictions on the time, place and manner of advertising." (Emphasis added)

See Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 778, 48 L.Ed.2d 346 (1976).

A more recent discussion of the subject is found in Ohralik v. Ohio State Bar Association, 436 U.S. 447, 56 L.Ed.2d 444 (1978). In Ohralik, the question was one of direct solicitation rather than by mail. At page 456 of Ohralik, the Court referred to the fact that truthful restrained advertising of the prices of "routine" legal services would not have an adverse effect on the professionalism of lawyers. It is clear, therefore, that the courts of the respective states which control the conduct of lawyers were not stripped of their authority reasonably to regulate advertising. See also In re Primus, 436 U.S. 412, 56 L.Ed.2d 417 (1977), and Kentucky Bar Association v. Stuart, 568 S.W.2d 933 (Ky.Sup.Ct. 1978).

The question of solicitation in person or by mail of other media is subject to regulation but such regulation must be reasonable. As was stated in Ohralik, the State has a legitimate and important interest in protecting the public

from those aspects of an attorney's soliciting of clients that involve fraud, undue influence, intimidation, overreaching and other forms of vexatious conduct.

In this inquiry, several forms of solicitation are brought to our attention. One is a sample of several different letters directed by lawyers to realtors, industrial concerns and other corporations stating that they are interested in serving them, listing the services to be performed and the charges to be made. Another is a printed publication by a lawyer setting forth his billing charges, how he bills, his educational background and his bar association memberships. There is also an advertisement by a lawyer in a supermarket coupon book, distributed at the supermarket, in which his name appears on a page where all the other ads are for merchandise discounts. The lawyer has his name, address and lists his fees for various legal services.

The idea of soliciting clients through advertising was for years denounced by bar associations as being unprofessional, unethical and detrimental to the best interests of the profession. In Bates, however, as we have noted above, some reasonable forms of solicitation by advertising are permitted. Parameters of permissible advertising have not yet been established except in general terms as set forth in the various decisions of the Supreme Court. In Mr. Justice Marshall's concurring opinion in Ohralik, he stated, at page 466:

> "By discussing the origin and impact of the nonsolicitation rules, I do not mean to belittle those obviously substantial interests that the State has in regulating attorneys to protect the public from fraud, deceit, misrepresentation, overreaching, undue influence and invasions of privacy. But where honest, unpressed 'commercial' solicitation is involved -- a situation not presented in either of these cases -- I believe it is open to doubt whether the State's interests are sufficiently compelling to warrant the restriction on the free flow of information

> which results from a sweeping non-solicitation rule and against which the First Amendment ordinarily protects."

The opinion pointed out that the Department of Justice had suggested that the disciplinary rules be reworded "so as to permit all solicitations and advertising except the kinds that are false, misleading, undignified and champertous."

We do not believe that simple letters by attorneys advertising the availability of their services addressed generally to a segment of the population with which the lawyers have no personal acquaintance are now proscribed where they are not false, misleading, undignified or champertous to use the words of the Department of Justice. See Opinion 457, 106 N.J.L.J. 98 (1980).

It is our opinion, however, that the ad in the supermarket throw-away on the page with merchandise discount coupons is undignified and,

perhaps, misleading in the sense that people may believe the quoted fees to be discounted fees. It is therefore unethical and should be discontinued.

While a number of other specific hypothetical questions or situations have been posed in the inquiry, we believe it advisable at this stage of the development of the law to address specific problems as they arise and to refrain from trying to answer general hypothetical questions.

ILLINOIS STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS

Opinion No. 749
(8/25/81)

FACTS AND QUESTIONS

A lawyer admitted to the Illinois Bar in 1979, after practicing for one year, has now completed his requirements for and expects to receive a Master of Laws Degree (L.L.M.) in Taxation. He inquires:

1. Can I state in the Yellow Pages, newspaper advertisement, business cards, announcements, letterhead, and the sign in front of my office, that I have a Masters of Laws Degree in Taxation and that I am engaged in general practice concentrating in business, estate, and tax planning?

2. Can I send letters and resumes to other attorneys stating that I am available for referrals, project work and consulting on tax and tax-related matters?

3. Can a letter and resume be sent to

attorneys in other states (Missouri, Kentucky and Indiana) stating that I am available for referrals on tax and Illinois matters?

4. Can a letter and resume be sent to non-attorneys in Illinois who are involved in tax matters, such as Certified Public Accountants, trust officers, life insurance agencies and business management or tax services for the purpose of having the attorney recommended to their clients?

OPINION

The answer to the first three questions is a qualified "Yes." The answer to the fourth question is "No."

The Illinois Code of Professional Responsibility (effective July 1, 1980) does not prohibit the types of advertising contemplated by the first three questions.

The advertising mentioned in the first question is directed to lay persons and in keeping with the mandates of Bates & O'Steen v.

State Bar of Arizona (1977), 433 U.S. 350, 97 S.Ct. 2691, Supreme Court Rule 2-101(a) specifies what types of information may be included in commercial publicity or public communications. We think "Yellow Pages," stationery, business card, announcements and office sign advertising which includes the educational and other background information is permissible.

Often the reputation and competence of lawyers (particularly young lawyers) are not sufficiently known to enable lay persons to make intelligent choices and they have difficulty in determining the competence of lawyers to render different types of legal services. The selection of legal counsel is particularly difficult for transients, persons moving into new areas, persons of limited education or means, and others who have little or no contact with lawyers (see ISBA EC 2-7). Selection of a lawyer by a lay person should be made on an informed basis. Advice and recommendation of

third parties such as relatives, friends, acquaintances, business associates, or other lawyers, and restrained publicity may be helpful. Advertisements and public communications, whether in law lists, announcement cards, newspapers or other forms, should be formulated to convey only information that is necessary to make an appropriate selection. Self-laudation should be avoided (see ISBA EC 2-8). The proper motivation for commercial publicity by lawyers lies in the need to inform the public of availability of competent, independent legal counsel. The public benefit derived from advertising depends upon the usefulness of the information provided to the community or to the segment of the community to which it is directed. Advertising marked by excesses of content, volume, scope or frequency, or which unduly emphasizes unrepresentative biographical information, does not provide that public benefit (see ISBA EC 2-8A).

Thus, misleading and deceptive advertising should be and is prohibited. The Code of Professional Responsibility recognizes the values of giving assistance in the selection process, while avoiding such objections. The forms of advertising permitted by the Code should be direct, dignified and comprehensible (see ISBA EC 2-10).

These same comments apply to the direct mail letters to attorneys contemplated in questions 2 and 3.

With respect to the use of educational degrees in advertising, we note that the ABA Code, in DR 2-102(F) (and the ISBA Code prior to 1975) expressly permits the use of such information. The ISBA Code, however, was amended in 1975 to eliminate DR 2-102(F) and, thereafter, in ISBA Opinion 473 (May 20, 1975), this Committee condemned the use by lawyers of the title "Doctor" in notices, letterhead and signs. See also ISBA Opinion 160 (April 17, 1959).

We believe that the circularization of letters and resumes to a select, targeted group of non-attorneys, is a private communication under Rule 2-103(a) and (e) and is, therefore, improper. We have recently decided, in ISBA Opinion 700 (November 4, 1980), that it is professionally improper for an attorney to initiate private communications with coaches and athletic directors to inform them that he is engaged in the practice of "sports law" and is available to represent clients. There we decided, on the basis of Rule 2-103(a) and ABA EC 2-8 (now, also, ISBA EC 2-8) that such activity was designed improperly to encourage the coaches and directors to recommend the attorney to the athletes under their charge. We think that opinion applies with equal force here.

DR 2-101. Rules of Court Applicable to Advertising and Publicity by Lawyers.

(A) A lawyer on behalf of himself or herself or partners or associates, shall not use or disseminate or participate in the preparation or dissemination of any public communication containing statements or claims that are false, deceptive, misleading or cast reflection on the legal profession as a whole.

(B) Advertising or other publicity by lawyers, including participation in public functions, shall not contain puffery, self-laudation, claims regarding the quality of lawyers' legal services, or claims that cannot be measured or verified.

(C) It is proper to include information, provided its dissemination does not violate the provisions of subdivisions (A) and (B) herein, as to

(1) education, degrees and other scholastic distinctions; dates of admission to any

bar; areas of the law in which the lawyer or firm practices, as authorized by the Code of Professional Responsibility; public offices and teaching positions held; memberships in bar associations or other professional societies or organizations, including offices and committee assignments therein; foreign language fluency;

(2) names of clients regularly represented, providing that the client has given prior written consent;

(3) bank references; credit arrangements accepted; prepaid or group legal services programs in which the attorney or firm participates;

(4) legal fees for initial consultation; contingent fee rates in civil matters when accompanied by a statement disclosing whether percentages are computed before or after deduction of costs and disbursements; range of fees for services, provided that there

be available to the public free of charge a written statement clearly describing the scope of each advertised service; hourly rates; and fixed fees for specified legal services.

(D) Advertising and publicity shall be designed to educate the public to an awareness of legal needs and to provide information relevant to the selection of the most appropriate counsel. Information other than that specifically authorized in subdivision (C) that is consistent with these purposes may be disseminated providing that it does not violate any other provisions of this rule.

(E) A lawyer or law firm advertising any fixed fee for specified legal services shall, at the time of fee publication, have available to the public a written statement clearly describing the scope of each advertised service, which statement shall be delivered to the client at the time of retainer for any such service. Such legal services shall include all

those services which are recognized as reasonable and necessary under local custom in the area of practice in the community where the services are performed.

(F) If the advertisement is broadcast, it shall be prerecorded or taped and approved for broadcast by the lawyer, and a recording or videotape of the actual transmission shall be retained by the lawyer for a period of not less than one year following such transmission.

(G) If a lawyer or law firm advertises a range of fees or an hourly rate for services, the lawyer or law firm may not charge more than the fee advertised for such services. If a lawyer or law firm advertises a fixed fee for specified legal services, or performs services described in a fee schedule, the lawyer or law firm may not charge more than the fixed fee for such stated legal service as set forth in the advertisement or fee schedule, unless the client agrees in writing that the services

performed or to be performed were not legal services referred to or implied in the advertisement or in the fee schedule and, further, that a different fee arrangement shall apply to the transaction.

(H) Unless otherwise specified in the advertisement, if a lawyer publishes any fee information authorized under this rule in a publication which is published more frequently than once per month, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such publication. If a lawyer publishes any fee information authorized under this rule in a publication which is published once per month or less frequently, the lawyer shall be bound by any representation made therein until the publication of the succeeding issue. If a lawyer publishes any fee information authorized under this rule in a publication which has no fixed date for publication of a succeeding issue, the lawyer

shall be bound by any representation made therein for a reasonable period of time after publication, but in no event less than 90 days.

(I) Unless otherwise specified, if a lawyer broadcasts any fee information authorized under this rule, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such broadcast.

(J) A lawyer shall not compensate or give anything of value to representatives of the press, radio, television or other communication medium in anticipation of or in return for professional publicity.

DR 2-104. Suggestion of Need of Legal Services.

(A) A lawyer who has given unsolicited advice to an individual to obtain counsel or take legal action shall not accept employment resulting from that advice, in violation of any statute or court rule.

(B) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment) or one whom the lawyer reasonably believes to be a client.

(C) A lawyer may accept employment which results from participation in activities designed to educate the public to recognize legal problems, to make intelligent selection of counsel or to utilize available legal services.

(D) A lawyer who is recommended, furnished or paid by a qualified legal assistance organization enumerated in DR 2-103(D)(1) through (4) may represent a member or

beneficiary thereof, to the extent and under the conditions prescribed therein.

(E) Without affecting the right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as the lawyer does not emphasize his or her own professional experience or reputation and does not undertake to give individual advice.

(F) If success in asserting rights or defenses of a client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder.

No. 83-1214

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DONALD A. ALESSI and JOHN P. BARTOLOMEI,

Petitioners,

—v.—

COMMITTEE ON PROFESSIONAL STANDARDS,
THIRD JUDICIAL DEPARTMENT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE STATE OF NEW YORK

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REASONS FOR GRANTING THE WRIT

I. A RECENT DECISION BY THE CONNECTICUT SUPREME COURT FURTHER ILLUSTRATES THE CONFLICT AMONG THE STATES ON THE ISSUES PRESENTED BY THIS PETITION

Petitioners submit this supplemental brief in order to bring to the Court's attention a recent decision by the Supreme Court of Connecticut in direct conflict with the ruling below by the Court of Appeals for the State of New York. Both cases involve the mailing of an advertising brochure from attorneys to local real estate agents. New York's ban on such mailings was upheld against a First Amendment challenge; Connecticut's ban has now been struck down on similar First Amendment grounds. Grievance Committee for The Hartford-New Britain Judicial District v. Trantolo, 192 Conn. 27 (Jan. 3, 1984).[1/]

1/ Petitioners were not aware of the Connecticut decision until it was published in Law Week after the petition for certiorari was filed in this case. 52 U.S.L.W. 2398 (Jan. 24, 1984).

This serious and continuing split among the states on an important issue of First Amendment law can only be resolved by a decision from this Court. The petition for certiorari should therefore be granted. A copy of the Connecticut decision is attached for the Court's convenience.

CONCLUSION

For the reasons stated herein and in petitioners' earlier submission, this Court should grant the petition for a writ of certiorari and summarily reverse the judgment below. In the alternative, certiorari should be granted and this case scheduled for plenary review.

Respectfully submitted,

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DATED: New York, N.Y.
March 2, 1984

APPENDIX

late the rule in some other way. Specifically, the defendants might be reprimanded if the advertisements were false, fraudulent, or misleading. DR 2-101 (A). On this issue the plaintiff bears the burden of proof. After examining the record, including viewing the four commercials in question, we conclude that the trial court could not have found that the plaintiff had satisfied its burden. The advertisements inform the listener of the value of professional legal assistance in certain situations and make known that the defendants are willing and able to provide such services. Thus they are informative and in no way misleading or deceptive. If some members of the audience find them distasteful, such consumers might very well react by shunning the service offered, thereby imposing an informal sanction more effective than any formal regulation. We hold, therefore, that the defendants did not violate the disciplinary rules by the use of these commercials.

There is error, the judgment is set aside and the case is remanded with direction to render judgment for the defendants.

In the opinion the other judges concurred.

Grievance Committee for the Hartford-New Britain Judicial District *v.* Joseph J. Trantolo, Jr., et al.
(10774)

Speziale, C. J., Peters, Parskey, Grillo and Ment, Js.

The defendant attorneys, in April, 1978, held an "open house" in conjunction with the opening of a law clinic operated by them. Printed invitations to the open house had been mailed to twenty-five Hartford area realtors, accompanied by a brochure explaining the nature of the clinic, its method of operation, the types of matters it handled and a schedule of the fees it charged for specific legal services. On May 1, 1978, known as "Law Day," the defendants published a notice in a Hartford area newspaper which, inter alia, stated that: "The Law Clinic of Trantolo

& Trantolo Salutes Law Day, May 1, 1978." Thereafter, in 1981, the plaintiff Grievance Committee for the Hartford-New Britain Judicial District filed a complaint in the Superior Court alleging that both of those actions constituted professional misconduct on the part of the defendants. The trial court, upon concluding that the mailing of the brochures and the invitations constituted solicitation in violation of the Code of Professional Responsibility, and that the "Law Day" notice constituted a commercial advertisement which was also violative of that code, rendered judgment against the defendants from which they appealed to this court. *Held:*

1. The trial court erred in failing to find that the brochures and the invitations were entitled to constitutional protection as commercial speech; the committee failed to prove that a blanket prohibition on mailed third party solicitations by attorneys was the only feasible method of protecting the state's interests in preserving the personal relationship between lawyer and client and in preventing the evils of solicitation.
2. The committee having failed to assert any substantial state interest in prohibiting statements such as the "Law Day" notice published by the defendants, the trial court erred in failing to find that that notice was entitled to constitutional protection.

Argued October 5, 1983—decision released January 3, 1984

Presentment by the plaintiff alleging that the defendants had violated certain disciplinary rules and ethical considerations of the code of professional responsibility as to advertising, brought to the Superior Court in the judicial district of Hartford-New Britain at Hartford and tried to the court, *Hammer, J.*; judgment finding a violation of certain disciplinary rules and ethical considerations, from which the defendants appealed to this court. *Error; judgment directed.*

Maxwel Heiman, with whom, on the brief, was *William J. Tracy, Jr.*, for the appellants (defendants).

Philip R. Dunn, grievance committee counsel, with whom were *Arnold M. Schwolsky*, assistant state's attorney, and *John M. Bailey*, state's attorney, for the appellee (plaintiff).

SPEZIALE, C. J. This case involves the same parties as a case also decided this date. *Grievance Committee*

v. *Trantolo*, 192 Conn. 19, A.2d (1984). The defendants appeal from the judgment of the trial court holding the defendants in violation of the Code of Professional Responsibility and contend that their actions were constitutionally protected. Because we find that the defendants have violated no constitutionally permissible rule, we find error.

The case encompasses two separate incidents. On April 7, 1978, the defendants, attorneys Joseph Trantolo and Vincent Trantolo, held an open house in connection with the opening of "The Law Clinic of Trantolo & Trantolo." Printed announcements previously had been mailed to approximately twenty-five Hartford area realtors, at least some of whom had no professional or personal relationship with the defendants. The mailing included a brochure entitled "A Message to Our Clients" explaining the nature of the clinic, its method of operation, the types of matters that it handled, and a schedule of fees charged for certain specific kinds of legal services.

On May 1, 1978, the Trantolos published a notice in a Hartford area newspaper that prominently displayed the following quotation by John Locke: "The end of law is not to abolish or restrain, but to preserve and enlarge freedom; for in all the states of created beings capable of laws, where there is no law, there is no freedom."[1] The following appeared below the printed quotation: "The Law Clinic of Trantolo & Trantolo Salutes Law Day, May 1, 1978."

On January 16, 1981, the plaintiff filed a substituted complaint alleging professional misconduct by the

[1] This quotation comes from Locke's Second Treatise of Government, § 57 (1690).

defendants.[2] On April 22, 1981, the trial court found that the mailing of brochures and the invitation to an "open house" constituted solicitation in violation of Disciplinary Rule 2-103 (C)[3] (hereinafter DR 2-103 (C)) and that the Law Day statement violated Disciplinary Rule 2-101 (B)[4] (hereinafter DR 2-101 (B)) and Ethical Con-

[2] Pursuant to its authority under Practice Book § 27B, the grievance committee had conducted a hearing on May 8, 1978, to consider the actions of the defendants and then decided to present the case to the Superior Court. See General Statutes § 51-90 (b).

[3] DR 2-103 (C) provides in relevant part: "A lawyer shall not request a person or organization to recommend or promote the use of his services or those of his partner or associate, or those of any other lawyer affiliated with him or his firm, as a private practitioner . . . ."

[4] DR 2-101 (B) provides:

"In order to facilitate the process of informed selection of a lawyer by the public, a lawyer may publish, subject to DR 2-103 and any guidelines adopted by the Superior Court, the following information in newspapers, periodicals and other printed publications provided that the information disclosed by the lawyer in such publication complies with DR 2-101 (A) and is presented in a dignified manner:

"(1) Name, including name of law firm and names of professional associates, office addresses and telephone numbers.

"(2) As may be authorized subject to DR 2-105 and DR 2-105A, one or more fields of law in which the lawyer or law firm practices, a statement that practice is limited to one or more fields of law, or a statement that the lawyer or law firm specializes in a particular field of law practice.

"(3) Date and place of birth.

"(4) Date and place of admission to the bar of state and federal courts.

"(5) Schools attended, with dates of graduation, degrees and other scholastic distinctions.

"(6) Public or quasi-public offices.

"(7) Legal authorships.

"(8) Legal teaching positions.

"(9) Memberships, offices, and committee assignments in bar associations.

"(10) Technical and professional licenses.

"(11) Foreign language ability.

"(12) Open prepaid or group legal services programs in which the lawyer has committed himself to participate.

"(13) Whether credit cards or other credit arrangements are accepted.

"(14) Office and telephone answering service hours.

"(15) Fee for an initial consultation.

"(16) Availability upon request of a written schedule of fees and/or an estimate of the fee to be charged for specific services.

sideration 2-9 and 2-10.[5] The court imposed no disciplinary measures due to the uncertainty surrounding the propriety of attorney advertising at the time of the defendants' actions and because it felt the Law Day statement was "an isolated incident."

"(17) Contingent fee rates subject to DR 2-106 (C), provided that the statement discloses whether percentages are computed before or after deduction of costs.

"(18) Range of fees for services, provided that the statement discloses that the specific fee within the range which will be charged will vary depending upon the particular matter to be handled for each client and that the client is entitled without obligation to an estimate of the fee within the range likely to be charged, in print size equivalent to the largest print used in setting forth the fee information.

"(19) Fixed fees for specific legal services, the description of which would not be misunderstood or be deceptive, provided that the statement discloses that the quoted fee will be available only to clients whose matters fall into the services described and that the client is entitled without obligation to a specific estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information."

[5] "EC 2-9 The lack of sophistication on the part of many members of the public concerning legal services, the importance of the interests affected by the choice of a lawyer, and prior experience with unrestricted lawyer advertising require that special care be taken by lawyers to avoid misleading the public and to assure that the information set forth in any advertising is relevant to the selection of a lawyer. The lawyer must be mindful that the benefits of lawyer advertising depend upon its reliability and accuracy. Examples of information in lawyer advertising that would be deceptive include misstatements of fact, suggestion that the ingenuity or prior record of a lawyer rather than the justice of the claim are the principal factors likely to determine the result, inclusion of information irrelevant to selecting a lawyer, and representations concerning the quality of service which cannot be measured or verified. Since lawyer advertising is calculated and not spontaneous, reasonable regulation of lawyer advertising designed to foster compliance with appropriate standards serves the public interest without impeding the flow of useful, meaningful, and relevant information to the public."

"EC 2-10 A lawyer should ensure that the information contained in any advertising which the lawyer publishes, or causes to be published, is relevant and is disseminated in an objective and understandable fashion, and would facilitate the prospective client's ability to compare the qualifications of the lawyers available to represent him. A lawyer should strive to communicate such information without undue emphasis upon style and advertising strategems which serve to hinder rather than to facilitate intelligent selection of counsel."

The defendants appealed to this court claiming that their actions were constitutionally protected under the first amendment to the United States constitution and article first, § 4 of the Connecticut constitution.

I

OPEN HOUSE AND BROCHURE

DR 2-103 (C) provides that "[a] lawyer shall not request a person or organization to recommend or promote the use of his services." The trial court found "that the mailing of the announcement together with the brochure indicates that it was the intention of the senders that the recipient recommend or promote the use of their services within the meaning of the Disciplinary Rule." Thus, the court concluded that the disciplinary rule prohibiting solicitation also encompasses and prohibits mailings to third parties.

It is well recognized that attorney advertising is commercial speech entitled to first amendment protection. *In the Matter of R.M.J.*, 455 U.S. 191, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982); *Ohralik* v. *Ohio State Bar Assn.*, 436 U.S. 447, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978); *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810, reh. denied, 434 U.S. 881, 98 S. Ct. 242, 54 L. Ed. 2d 164 (1977); see *Grievance Committee* v. *Trantolo*, supra. The United States Supreme Court has defined commercial speech as "expression related solely to the economic interests of the speaker and its audience." *Central Hudson Gas & Electric Corporation* v. *Public Service Commission of New York*, 447 U.S. 557, 561, 100 S. Ct. 2343, 65 L. Ed. 2d 392 (1980). The plaintiff characterizes the mailings as solicitation; the defendants characterize the mailings as advertisements. "[A]ll advertising either implicitly or explicitly involves solicitation." *Koffler* v. *Joint Bar Assn.*, 51 N.Y.2d 140, 146, 412 N.E.2d 927 (1980).

Whether the instant mailing is characterized as an advertisement or as solicitation, it is commercial speech, and entitled to some protection, because it relates "to the economic interests of the speaker." *Central Hudson Gas & Electric Corporation* v. *Public Service Commission of New York*, supra.

Although commercial speech enjoys the protection of the first amendment, the state may impose appropriate restrictions. The question before us is whether DR 2-103 (C), which the trial court held to be a blanket prohibition of mailed solicitation, is an appropriate restriction that passes constitutional muster. We hold that it is not.

A four part analysis determines the validity of state restrictions on commercial speech. *In the Matter of R.M.J.*, supra, 203–204 n.15. The first part of the analysis is a threshold test that determines whether the commercial speech is entitled to any protection under the first amendment. First, the speech in question must concern lawful activity and not be misleading. Only if the speech passes this threshold test do we move on to the remaining parts of the analysis: second, the asserted governmental interest in regulating the speech must be substantial; third, the regulation must directly advance the governmental interest asserted; and fourth, the regulation must be narrowly drawn and must not be more extensive than is necessary to serve that interest. *Central Hudson Gas & Electric Corporation* v. *Public Service Commission of New York*, supra, 566.

In applying this analysis to the instant case we note first that there has been no finding, nor does the record indicate, that the mailing of the brochure and open house announcement was unlawful or misleading. We conclude therefore that the mailing passes the threshold

test and is entitled to the protection accorded commercial speech. As to the second part of the analysis, concerning the governmental interest, the plaintiff asserted that the only purpose of the brochure and open house announcement would be to induce the realtors to recommend the Law Clinic of Trantolo & Trantolo to property sellers and buyers. The asserted governmental interests in the prohibition of mailing to such intermediaries are the preservation of the personal relationship between lawyer and client and the prevention of the evils of solicitation. The United States Supreme Court has recognized that these are substantial state interests and may be the basis for a ban on certain in-person solicitations.[6] *Ohralik* v. *Ohio State Bar Assn.*, supra. Third, the regulation prohibiting third party solicitation, DR 2-103 (C), directly advances the state's interest in preventing the evils of solicitation. Under the fourth part of commercial speech analysis, however, this disciplinary rule fails. The plaintiff has not proved that its prohibitive regulation is not more extensive than is necessary to serve its interest. Accordingly, we conclude that the blanket prohibition

[6] The trial court found that these mailings constituted solicitation within the meaning of DR 2-103 (C). Even so, the mailings in this case do not present the evils of in-person solicitation that were found in *Ohralik*: "[S]tirring up litigation, assertion of fraudulent claims, debasing the legal profession, and potential harm to the solicited client in the form of overreaching, overcharging, underrepresentation, and misrepresentation." *Ohralik* v. *Ohio State Bar Assn.*, 436 U.S. 447, 461, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978). None of the evils found to justify the prohibition of in-person solicitation in *Ohralik* has been found in the case before us. The brochure, listing services and some prices of the law clinic, contained no information that could not have been printed in a newspaper advertisement. The invitation to the open house was designed to announce the opening of the law clinic; the defendants asserted that no one was expected to or in fact did attend the open house. The law clinic initiated no further contact with any of the realtors. The plaintiff has not shown that the mailing was misleading or that persons felt pressured to recommend the defendants.

of mailed solicitations to third parties violates the free speech provisions of the United States constitution and the Connecticut constitution.

We are not saying that the judges of the Superior Court may not regulate solicitations mailed to third parties or otherwise guard against the evils of solicitation. But less intrusive means of satisfying the state's concerns exist. The state could require that a copy of any mailing and the mailing list be filed with the grievance committee. See *Kentucky Bar Assn.* v. *Stuart*, 568 S.W.2d 933 (Ky. 1978); *Koffler* v. *Joint Bar Assn.*, 51 N.Y.2d 140, 412 N.E.2d 927 (1980). Envelopes and contents could be required to be prominently marked to announce that "[t]his is an advertisement." See *In the Matter of R.M.J.*, supra, 206 n.20. Guidelines could be developed to regulate sensitive areas such as funeral homes or hospitals where the potential client may be unduly susceptible to suggestions from figures in authority. See American Bar Association, Model Rules of Professional Conduct (Proposed Final Draft, 1981), Rules 7.2 and 7.3 (b). A third party should have no personal incentive to secure clients for a particular attorney. See note, "Mail Advertising by Attorneys and the First Amendment," 46 Albany L. Rev. 250, 268 n.107 (1981).

Because the plaintiff did not prove that the blanket prohibition of third party mailings was the only feasible method of protecting its interests and therefore not more extensive than necessary, the trial court erred in failing to find these mailings protected as commercial speech.

II

Law Day Statement

The trial court found that the May 1, 1978 publication of a John Locke quotation constituted a commer-

cial advertisement. Because the statement gave no information relevant to the selection of an attorney, the court reasoned, it was not entitled to constitutional protection under *Bates* v. *State Bar of Arizona*, supra.[7]

The Law Day statement contained no reference to services that would be provided or fees that would be charged. It contained no address or phone number.[8] It is difficult to see how a quotation from John Locke and a salute to Law Day from a particular legal clinic constitutes a commercial advertisement that serves the economic interest of the speaker. As a salute to a celebrated day in the legal community, we find that the statement more resembled an ideological statement than a commercial advertisement.

Characterization of the statement as "ideological" or "commercial" is unnecessary, however, for as either the statement is protected. If the statement is political or ideological, it naturally enjoys the fullest protection under the first amendment to the United States constitution and article first, § 4 of the Connecticut constitution. Waiver of first amendment rights has never been a precondition of admission to the bar; attorneys are as entitled to public expression of their sentiments as any other citizen. Alternatively, even if the statement is commercial it is entitled to constitutional protection as the plaintiff has asserted no substantial interest in prohibiting such statements. *In the Matter*

[7] The United States Supreme Court in *Bates* noted the public's strong interest in receiving information and held that "advertising by attorneys may not be subjected to blanket suppression." *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 383, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977).

[8] In the same issue of the newspaper, several pages from the Law Day statement, the defendants published an advertisement for their law clinic. Although the trial court in its memorandum of decision alluded to this advertisement and to the fact that the defendants were established advertisers in the newspaper, we do not find that information relevant to this discussion.

of R.M.J., supra, 203. The trial court therefore erred in failing to find the Law Day statement constitutionally protected.

There is error, the judgment is set aside and the case is remanded with direction to render judgment for the defendants.

In this opinion the other judges concurred.

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No. 83-1211

IN THE

Supreme Court of the United States

October Term, 1983

DONALD A. ALESSI and JOHN P. BARTOLOMEI,
Petitioners,

vs.

COMMITTEE ON PROFESSIONAL STANDARDS, THIRD JUDICIAL DEPARTMENT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

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No. 83-1214

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983.

DONALD A. ALESSI and JOHN P. BARTOLOMEI,

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vs.

COMMITTEE ON PROFESSIONAL STANDARDS, THIRD JUDICIAL DEPARTMENT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK.

RESPONDENT'S BRIEF IN OPPOSITION.

Preliminary Statement.

Respondent's brief is submitted in opposition to the petition for a writ of certiorari, which is based on an opinion of the New York Court of Appeals, on remand, entered on November 3, 1983. *Matter of Alessi and Bartolomei*, 60 N.Y. 2d 229. This opinion, affirmed, in light of this

Court's decision in *In re R.M.J.*, 455 U.S. 191 (1982), the Appellate Division of the New York State Supreme Court, Third Judicial Department, which found that petitioners had improperly solicited clients via direct mail. *Matter of Alessi, Bartolomei, Pedicone and Zablotny*, 88 A.D. 2d 1089 (3d Dept. 1982).

Statement of Case.

The petitioners Donald A. Alessi and John P. Bartolomei were New York partners in "The Legal Clinic of Cawley and Schmidt" (hereafter referred to as "Clinic"). The Clinic maintained offices for the practice of law in four cities in New York including Albany.

During August and September, 1979, Attorney Zablotny authored the letter involved in this matter and submitted it to both Alessi and Bartolomei who reviewed it, edited it and approved it for bulk mailing from each of the four offices. Approximately 1,000 letters were mailed to realtors from each office. The letter from the Albany office was signed by or on behalf of Pedicone, the Clinic's attorney in Albany.

The respondent herein served a Petition of Charges and Specifications upon the petitioners herein and Attorneys Pedicone and Zablotny, charging the respondents with violating the Code of Professional Responsibility and Section 479 of the Judiciary Law of the State of New York.

The respondents in the disciplinary proceeding moved to dismiss the Petition of Charges. Following the New York Court of Appeals opinion in *Matter of Greene*, 54 N.Y. 2d 118 (1981), *cert. denied*, 455 U.S. 1035 (1982),

which sustained an order of the Appellate Division, Second Judicial Department, holding an attorney had improperly solicited clients via direct mail to real estate brokers, the motion was denied and an answer to the Petition of Charges was filed.

The respondents in the disciplinary proceeding moved to refer issues raised to a judge to hear and report. The Appellate Division determined a reference was unnecessary and found respondents guilty of misconduct:

> [I]n permitting or approving the mailing of letters to realtors as alleged in the petition. However, since the letters were apparently sent in good faith and in reliance on *Bates v. State Bar of Arizona* (433 U.S. 350) and prior to the decision of the Second Department in *Greene*, we determine that no sanction should be imposed for such misconduct.

Alessi and Bartolomei appealed to the New York Court of Appeals which on November 18, 1982, dismissed the appeal *sua sponte*, "upon the ground that no substantial constitutional question is directly involved."

On April 18, 1983, this Court granted petitioner's Writ of Certiorari vacating the judgment of the New York Court of Appeals and remanding the case to said Court for further consideration in light of *R.M.J.*

Upon remand, the New York Court of Appeals reaffirmed its earlier decision holding there is no constitutional infirmity in the application of Section 479 of the Judiciary Law and provisions of the Code of Professional Responsibility to the attorneys' conduct in approving the mailing by the legal clinic in which they were partners to some 1,000 realtors.

ARGUMENT I.

The decision below does not create a conflict with the decisions in other states.

Petitioners assert the decision below is in direct conflict with decisions on the same subject issued by at least two other State courts of last resort. *Matter of Jaques,* 407 Mich. 26, 281 N.W. 2d 469 (1979), is cited as a case in conflict. In *Jacques,* an attorney requested the business agent for a union to recommend employment of him to members and their survivors to handle their claims resulting from an explosion. The Court in a five to two decision held Jaques' conduct did not rise to the level of "fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct' " which the disciplinary rules may properly seek to prevent, citing *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978), 281 N.W. 2d at 470.

Jaques is disginguishable from the case in question for the reason that the Michigan Court, in its majority decision, failed to address the issue of a conflict of interest, which underpins the decision in the case below. In the decision below, the Court noted that:

> [T]he proscription is not against the attorney making known to potential clients the availability of his services or even to his doing so through third parties, but against his doing so in a particular manner: through a third party whose interests may be more closely intertwined with those of the attorney than with those of the client. 60 N. Y. 2d at 234.

There is a substantial governmental interest in preventing conflicts of interest in attorney-client relationships. *Matter of Greene,* 54 N. Y. 2d at 127.

In her dissent in *Jacques*, Chief Justice Coleman noted:

> The use of another person as an intermediary to solicit potential clients may pose dangers as substantial as soliciting them directly. 281 N.W. 2d at 476.
>
> The potential for overreaching or undue influence is substantial when the intermediary solicits the potential client in person. The intermediary may also be a professional, such as a salesperson, trained in the art of persuasion. Such in-person solicitation, like in-person solicitation by an attorney, "may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection," *Ohralik, supra,* 436 U.S. 457, 98 S.Ct. 1919 * * *. Finally, the potential for all these harms increases if the intermediary has or perceives that he might have an interest in successfully soliciting clients. 281 NW 2d. at 477 (footnotes omitted).

The possible conflict of interest, present in the case below, was not present in *Jacques*. There the majority stated:

> His solicitation was directed to a union business agent who ostensibly represented the interests of union members which (*sic*) potential claims. The union agent possessed the expertise to make a detached and informed evaluation of Jacques' qualifications before passing any recommendation along to his members * * *. Under these circumstances, the union agent served as a buffer between the attorney and prospective clients thus alleviating the potential for overreaching and undue influence. 281 N.W. 2d at 470 (footnote omitted).

In the case below, as well as in *Greene*, the parties who were approached by the attorneys via direct mail to solicit clients on the attorney's behalf were professional salespeople in the guise of real estate brokers. The possible areas of conflict that could arise in such a situation have been identified by the New York Court of Appeals:

> The possibility that the lawyer's view of marketability of title may be colored by his knowledge that the referring broker normally will receive no commission unless title closes, the improbability that the attorney will negotiate to the lowest possible level the commission to be paid to the broker who is an important source of business for him (or suggest to the client that he do so), the probability that the lawyer will not examine with the same independence that he otherwise would the puffery that the broker has indulged in to bring about the sale * * * *Matter of Greene*, 54 N. Y. 2d at 129.

Thus, *Jaques* is distinguishable from the case below. *See also, Woll v. Att'y Gen.*, 116 Mich. App. 791 (1982).

The other case petitioners cite to support their theory of a conflict among the states is *Kentucky Bar Association v. Stuart*, 568 S.W. 2d 933 (Ky. 1978). In that case, attorneys mailed letters to real estate brokers advising them they handled real estate work.

Stuart is distinguishable from the case in question. In *Stuart* as was the case in *Jaques*, the court did not consider the issue of a conflict of interest. In *Stuart*, the court merely recited that the letters sent by the attorneys did not "constitute 'in-person solicitation,' " citing *Ohralik*, 568 S.W. 2d at 934. The Kentucky court also failed to consider the

express warning of Justice Powell in *Ohralik*, that solicitation throught the use of intermediaries is as rife with potential problems as is first-person solicitation. 436 U.S. at 464, n. 22.

The *Jaques* and *Stuart* decisions were considered by the New York Court of Appeals in *Greene:*

> Both *Jaques* and *Stuart* may be distinguished on the ground that neither discussed potential conflict of interest, but to the extent that they cannot be so distinguished we decline to follow them. 54 N.Y. 2d at 129, n. 4.

Respondents submit that *Matter of Discipline of Appert*, 315 N.W. 2d 204 (Minn. 1981), cited by petitioners does not support their position herein. In fact, in *Appert*, the court stated:

> Overbearing and intrusive practices such as personal solicitation, direct or *indirect* * * * are not permitted. 315 N.W. 2d at 215. (Emphasis supplied.)

Petitioners neglected to point out that Louisiana also prohibits solicitation through an intermediary. *Allison v. Louisiana State Bar Association*, 362 So. 2d 489 (La. 1978).

Finally, petitioners argue the decision below conflicts with ethics opinions of various state bar associations. Those opinions do not constitute decisions of state courts of last resort. Therefore, petitioners cannot rely on them to support a request for review on writ of certiorari. 28 U.S.C. U.S. Sup. Ct. Rule 17.1.

In view of the fact there is no conflict between New York and any other sister state on the issues herein, there is no dispute to be put before this court.

ARGUMENT II.

The decision of the court below is not inconsistent with this court's holding in *R.M.J.* and related cases.

The earlier judgment of the court below was vacated by this court and remanded for further consideration in light of *R.M.J.* On remand, the court below did not find its prior decision to conflict with *R.M.J.* concluding:

> [T]here is no constitutional infirmity in the application of section 479 of the Judiciary Law and provisions of the Code of Professional Responsibility to respondents' conduct in approving the mailing by the legal clinic in which respondents are partners to some 1,000 realtors in the Albany area of a letter quoting fees for listed real estate transactions. 60 N.Y. 2d at 231.

As noted in Argument I, *supra*, the case below involved the issues of direct or indirect personal solicitation and the possibility of conflict of interest in the context of mailings to third parties. These issues were not present in *R.M.J.* but have been considered by this Court in earlier decisions.

In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), this court held that "advertising by attorneys may not be subjected to blanket suppression." 433 U.S. at 383. The court went on to state, however:

> The constitutional issue in this case is only whether the State may prevent the publication in a newspaper of appellants' truthful advertisement concerning the availability and terms of routine legal services (433 U.S. at 384).

The Court did not hold attorney advertising may not be regulated in any manner and recognized that restraint might be justified on in-person solicitation. Further, "[a]s with other varieties of speech, it follows as well that there may be reasonable restrictions on the time, place, and manner of advertising" (433, U.S. at 384).

On the question of in-person solicitation, the court noted:

> [W]e also need not resolve the problems associated with in-person solicitation of clients—at the hospital room or the accident site, or in any other situation that breeds undue influence—by attorneys or their agents or "runners". Activity of that kind might well pose dangers of overreaching and misrepresentation not encountered in newspaper announcement advertising. 433 U.S. at 366.

The narrow scope of *Bates* was recognized in *R.M.J.*, 455 U.S. at 200.

In *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978), this court held:

> The entitlement of in-person solicitation of clients to the protection of the First Amendment differs from that of the kind of advertising approved in *Bates*, as does the strength of the State's

> countervailing interest in prohibition. 436 U.S. at 455.

The court noted where an attorney's exercise of judgment on behalf of his client may be clouded by his own pecuniary self-interest and the transaction is not visible or open to public scrutiny, or otherwise subject to effective oversight, the State may constitutionally impose a prophylactic measure whose objective is the prevention of harm before it occurs. 436 U.S. at 461, 464-467.

In *R.M.J.*, it was noted that in *Ohralik:*

> [T]he Court held that the possibility of "fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct' " was so likely in the context of in-person solicitation, that such solicitation could be prohibited. 445 U.S. at 202.

While this court permitted direct mail to a prospective client in *In re Primus,* 436 U.S. 412 (1978), it was noted that there was no in-person solicitation for pecuniary gain. The court also noted the absence of "a serious likelihood of conflict of interest or injurious lay interference with the attorney-client relationship." 436 U.S. at 436.

In *Matter of Koffler,* 51 N.Y. 2d 140 (1980), *cert. denied* 450 U.S. 1026 (1981), the New York Court of Appeals held that the State could not constitutionally prohibit advertising of attorney services by direct mail to potential clients. The court, however, explicitly reserved on the question of third-party mailings noting:

> For example, third-party mailings will, if their ends are to be achieved, almost always involve in-person solicitation by the intermediary, and are,

> therefore much closer to speech of the type *Ohralik v. Ohio State Bar Assn.* (436 U.S. 447) has held can be proscribed. 51 N.Y. 2d at 145, N. 2 (citation omitted).

R.M.J. also involved the issue of direct mail, to wit the sending of cards announcing the opening of an attorney's office. As noted by the court below, the fact that *R.M.J.* does not make mention of conflict of interest is not surprising inasmuch as conflict of interest was totally unrelated to the advertising under consideration in that case. 60 N.Y. 2d at 233, 234.

It is undisputed that the letter in the case below is not inherently misleading but "[e]ven when a communication is not misleading, the State retains some authority to regulate." *In re R.M.J.*, 455 U.S. at 203. It is at this point that the State must address the four part test enunciated in *Central Hudson Gas Company v. Public Service Commission*, 447 U.S. 557, 563 (1980). As stated in *R.M.J.*:

> [T]he *Central Hudson* formulation must be applied to advertising for professional services with the understanding that the special characteristics of such services afford opportunities to mislead and confuse that are not present when standardized products or services are offered to the public. 455 U.S. at 203, 204, n. 15.

Under the *Central Hudson* test, both petitioner and respondent agree the first two parts of the test pose no problem. The letter is protected by the First Amendment and is not misleading (part 1) and the asserted governmental interest is substantial (part 2).

It is the last two parts of this test that are crucial to a determination of the constitutionality of the State action. The two issues to be resolved are 1. Does this type of regulation directly advance a substantial governmental interest and 2. Is the regulation more extensive than necessary to serve the governmental interest.

There is a substantial governmental interest in preventing conflicts of interest in attorney-client relationships which the statute directly protects.

> The Supreme Court has many times recognized as a proper and substantial governmental interest the prevention of conflicts of interest. (*Matter of Primus*, 436 U.S. 412, 436 ["serious likelihood of conflict of interest"]; *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 461, n. 19, *supra* ["we cannot say that the pecuniary motivation of the lawyer who solicits a particular representation does not create special problems of conflict of interest"], and see *id.*, at p 464, n 22; *NAACP v. Button*, 371 U.S. 415, 443 ["serious danger * * * of professionally reprehensible conflicts of interest which rules against solicitation frequently seek to prevent"]; see, also, *Mine Workers v. Illinois Bar Assn.*, 389 U.S. 217, 223-224). *Matter of Greene*, 54 N.Y. 2d at 127, 128.

It cannot be argued that *R.M.J.* overrules this court's prior decisions on conflicts of interest. This is made clear by the court's citation in *R.M.J.* of *Ohralik*, 445 U.S. at 202.

Clearly the potential for conflicts of interest exists in the facts of the case below. Present is the pecuniary interest

of both the attorney and broker. Further, since the broker is in direct contact with the prospective attorney's client, there is the in-person solicitation element together with the lack of sophistication of the usual client, the pecuniary interest of the solicitor and the difficulty or impossibility of obtaining reliable proof as to what occurred in such an encounter. *Ohralik v. Ohio State Bar Assn.*, 436 U.S. at 464-466.

Examples of the possible areas of conflict are set forth under Argument I, *supra*.

While petitioner asserts there is an insufficient showing of a potential conflict of interest to warrant the regulation in question, as noted in *Ohralik* there is no requirement that there be "actual proved harm to the solicited individual." (436 U.S. at 464) and "the absence of explicit proof or findings of harm or injury is immaterial." *Id.* at 468. "[T]he potential for overreaching that is inherent in a lawyer's in-person solicitation of professional employment" is sufficient to justify "the need for prophylatic regulation in furtherance of the State's interest in protecting the lay public." *Id.*

The restriction imposed by the statute in question is not one upon content. "[A]s a regulation of the manner of speech, control of which in light of the governmental interest to be served, the lack of effectiveness of the medium and the more effective available alternatives, must be deemed reasonable, the statute as applied is constitutional." *Matter of Greene*, 54 N.Y. 2d at 127 (citations omitted).

Since the regulation directly advances a substantial State interest, the fourth part of the *Central Hudson* test must be applied. Although it has been suggested that a pre-filing

requirement might provide adequate protection (see, *Stuart, supra*) such an alternative would not solve the problem presented herein. While such a filing requirement might be adequate to protect against evils of direct mail addressed to clients, such a filing would not protect against the conflict of interest problems involved in an attorney's mailing to brokers. In such a case, the client relationship results not from the letter but from the intermediation of the broker.

Additionally, it should be noted that the Court below did not ban all third party mailings. The court in *Greene* expressly limited its ruling to third party mailing to brokers (54 N.Y. 2d at 126). As noted by the court below:

> What is proscribed is mailing to that limited number of third persons who themselves may have dealings with potential clients of the attorney from which a conflict of interest may result. 60 N.Y. 2d at 234.

The state regulation is no broader than necessary to protect the substantial governmental interests.

ARGUMENT III.

The decision below does not abridge petitioners' due process rights.

Contrary to petitioners' claim in Point III, constitutionally adequate notice was given that their action in soliciting clients through real estate brokers was impermissible and not validated by *Bates*.

The court below while acknowledging respondents had a right to fair notice of acts for which they could be

punished, found they had notice from section 479 of the Judiciary Law of the State of New York and Disciplinary Rule 2-103(A) of the Code of Professional Responsibility that all solicitation of legal business was proscribed. 60 N.Y. 2d at 236. In *Greene*, the court stated:

> The effect of our *Koffler* decision and of the Supreme Court decisions referred to in that opinion and in this is to leave the rule declared by the Legislature in section 479 of the Judiciary Law, free to operate in areas not affecting constitutionally free speech (*Belli v. State Bar of Cal.*, 10 Cal 3d 824, application for stay den 416 U.S. 965). Though amendment of the section might clarify the intention of the Legislature as a source, co-ordinately with the judiciary, of the public policy governing the conduct of lawyers, the absence of such amendment leaves no vacuum. The section remains effective except as constitutionally proscribed. 54 N.Y. 2d at 124.

As noted in the decision below, while respondents did not have the benefit of either *Koffler* or *Greene* before their letter was sent:

> [T]hey were then chargeable with knowledge from *Ohralik* and *Primus*, both decided by the Supreme Court on May 30, 1978, and its earlier decisions in *NAACP* and *Mine Workers*, that the constitutional invalidity of section 479 did not necessarily extend to solicitation involving personal contact and the potential for conflict of interest. 60 N.Y. 2d at 236.

Certainly, petitioners could not have concluded that *Bates* freed them from the strictures of Judiciary Law section 479. *Bates* clearly put attorneys on notice that it was a narrowly-drawn decision.

> The issue presently before us is a narrow one * * *. The heart of the dispute before us today is whether lawyers also may constitutionally advertise the *prices* at which certain routine services will be performed. 433 U.S. at 366-368. (Emphasis in original.)
>
> In holding that advertising by attorneys may not be subjected to blanket suppression, and that the advertisement at issue is protected, we, of course, do not hold that advertising by attorneys may not be regulated in any way. *Id.* at 383.

Neither *Ohralik* nor *Primus* support petitioners' position. In *Ohralik*, this court held:

> The Rules prohibiting solicitation are prophylactic measures whose objective is the prevention of harm before it occurs. The Rules were applied in this case to discipline a lawyer for soliciting employment for pecuniary gain under circumstances likely to result in the adverse consequences the State seeks to avert * * *. The State's perception of the potential for harm in circumstances such as those presented in this case is well founded * * *. Although our concern in this case is with solicitation by the lawyer himself, solicitation by a lawyer's agents or runners would present similar problems. 436 U.S. at 464 and 464, n. 22.

In *Primus*, it was noted:

> The State is free to fashion reasonable restrictions with respect to the time, place, and manner of solicitation by members of its Bar * * *.
>
> We have no occasion here to delineate the precise contours of permissible state regulation. 436 U.S. at 438 and 438, n. 33.

Mathematical precision is not required before a statute can be enforced. No more than a reasonable degree of certainty can be demanded. *Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952).

Application of Judiciary Law section 479 as interpreted by the New York Court of Appeals does not violate petitioners' due process rights when their conduct has been judged not by the legislative standard alone but by that standard as constitutionally limited. *United States v. Raines*, 362 U.S. 17, 22 (1960).

Petitioners while on notice that the issue in *Bates* was very narrow, here claim that decision is so expansive as to, in effect, invalidate the statute in question on the ground that they had no notice of what type of conduct was proscribed. Contrary to their position, it is clear that all solicitation by New York attorneys, directly or indirectly is proscribed by Judiciary Law section 479 except for that conduct allowed by *Bates* and its progeny.

As Mr. Justice Holmes noted, "the law is full of instances where a man's fate depends on his estimating rightly * * *." *Nash v. United States*, 229 U.S. 373, 377 (1913).

Conclusion.

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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